



**25<sup>th</sup> Annual Willem C. Vis International Commercial Arbitration Moot**

*22<sup>th</sup> - 29<sup>th</sup> March, Vienna (Austria)*

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## **Work Project**

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## Introduction

The present work project illustrates the culmination of several months of research and commitment of the Faculty of Law of NOVA University of Lisbon's team in the 25<sup>th</sup> Willem C. Vis International Commercial Arbitration Moot.

Through the following chapters we intend to describe this renowned competition by explaining what it consists of and how it is organized, namely, by exploring all the phases of the Moot, from the written *memoranda* to the oral pleadings in Vienna. Moreover, since the Vis Moot was a life changing experience for us, we intend to narrate our journey during this time period and also render our input on what could possibly be improved.

To better understand this year's *Problem*, we will approach the four issues introduced by the Vis Moot organisation, which will be addressed in both Claimant and Respondent's perspective. These will afterwards be thoroughly discussed in the *memoranda* that were submitted by Nova's team which are attached to this introductory report.

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## The Competition

The Willem C. Vis International Commercial Arbitration Moot is the world's leading arbitration competition that each year takes place in Vienna. It started in 1994 with only 11 teams but this year's edition (25<sup>th</sup> Moot) broke down the record by registering 366 teams. This renowned competition has attracted every year thousands of students, that during one week have the opportunity to interact with and compete against law students coming from vastly different backgrounds.

The primary goal of the Vis Moot is educational, as it aims to encourage the study of international commercial law, while giving young practitioners the opportunity to use arbitration as a way to settle disputes arising out of international business contracts. Every year, a different problem composed by controversial issues is released, enabling future lawyers to use alternative dispute resolution methods to solve questions of contract under the CISG<sup>1</sup> and specified arbitration rules. In every edition a different set of arbitration rules is applied. This

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods.

year, the UNCITRAL Rules were the applicable ones, nevertheless, ICC rules and CAM-CCBC, for instance, have also been applied in previous cases<sup>2</sup>.

Usually, students must discuss “*hot*” topics of international commercial law and find a solution for them. This year was no exception. In which concerns the merits of this year’s *Problem*, the teams had to improve their knowledge on the incorporation of standard terms into business contracts (under this topic, the so called “*battle of forms*” was addressed) and had to study the assessment of conformity of the goods produced in respect to ethical standards. Regarding the procedural issues, these referred to the involvement of an appointing authority in the arbitral proceedings and to the challenge of an arbitrator based on the presence of a third-party funder.

Throughout the years, the Vis Moot Court has been recognized as the biggest competition in this area of expertise<sup>3</sup>, providing both students and professionals with unforgettable moments. Furthermore, it also enables the possibility to build professional relationships with some of the best practitioners and represents an excellent starting point for those wishing to pursue an exciting career in the field of dispute resolution. Frequently, law firms seek students that have already participated in events such as this one as it guarantees, at some level, that the possible candidate has already spent many hours improving the legal research and writing skills that practicing attorneys need.

In addition, all participants in the Moot, whether as arbitrator or student, are encouraged to join the Moot Alumni Association which plays a major function at the Moot, since it creates and coordinates the majority of the social program for the people involved. The Moot Alumni Association also constitutes a way of establishing new friendships and reconnecting with old ones, and a unique opportunity for professional networking. Notwithstanding, despite the dimension that the Vis Moot has achieved, an undeniable fact is that there is still a considerable number of people that are not aware of the magnitude of this event. Although twenty-five years have passed since the first competition, this is, for instance, only the second year that Portuguese teams have joined the competition. Nevertheless, the Vis Moot is increasingly growing and consequently, every year, it embraces new nationalities.

In conclusion, the Vis Moot constitutes a challenging experience and this is very much due to the international nature of this competition: from the subject matter to the competition

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<sup>2</sup> The ICC Arbitration Rules were applied in the 22<sup>nd</sup> Vis Moot (2014-2015) and the CAM-CCBC Arbitration Rules in the 25<sup>th</sup> Vis Moot (2016-2017).

<sup>3</sup> A BBC online correspondent stated that the Vis moot - “*can safely be called the Olympic Games of International Trade Law*” available at: [https://h2g2.com/edited\\_entry/A588170](https://h2g2.com/edited_entry/A588170). (last visited on 30<sup>th</sup> April, 6:47 pm).

format and the profile of the participants. The international arbitration sector has grown continuously and therefore, an opportunity to compete in the Vis Moot is a great way to start, for any law student interested in a future career in international arbitration.

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### How is the Moot organized?

The competition is fundamentally divided in two moments: first, the written *memoranda*, and second, the oral pleadings. In order to complete the first step of this journey, the *memoranda* submission, each team will have two months to write Claimant's *memorandum*, and then only one month to write Respondent's. During this phase, all team effort is placed in these two documents as they will define the strongest arguments of the team. The process of writing the *memorandum*, indeed, is the first test to the teams since they must combine each member's way of writing, their research method and, most importantly, their personalities. Each *memorandum* is composed by a maximum of thirty-five pages<sup>4</sup>. Usually, the first five pages are dedicated to an explanation of the facts and a summary of the arguments, as the remaining pages are focused in the procedural and substantive issues. Each *memorandum* must be composed by all possible arguments including the subsidiary ones. In this written phase, in order to build a solid case, the students place long hours in search of authorities and case law supporting their arguments. Furthermore, the mandatory submission of these documents is an excellent way found by the Moot organisation to encourage students to use their advocate skills in order to find creative solutions for "*the Problem*".

After the written *memoranda* are submitted, a new chapter begins: the preparation for the oral pleadings that will take place in Vienna. In order to be properly prepared for this phase, many teams decide to resort to online sessions and to participate in "*pre-moots*". This sort of exercises allows students to expose their arguments and explore new ones while being before a panel of arbitrators. The online sessions are very useful for the teams as they have the opportunity, not only to practise their oral arguments and improve their speeches, but also to hear the counter-arguments that the other party has developed. These sessions also enable fruitful contact between teams from different parts of the world. This year, for instance, NOVA Faculty of Law team had the chance to perform online sessions with teams from various countries such as: Argentina, Brazil, Egypt, England, EUA, India, Iran and Serbia.

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<sup>4</sup> Excluding cover pages, tables of contents, indexes and lists of authorities.

Finally, the “*pre-moots*”, which are also part of the preparation for the oral pleadings, are crucial for an excellent performance. From the beginning of January, many institutions around the world promote these “*pre-moots*” which constitute a simulation of what will happen in Vienna. This kind of preparation is definitely the one that allows a bigger growth, since it is the most similar experience to what a team will face in Vienna. In this edition, NOVA Faculty of Law team had the opportunity to attend to Lisbon<sup>5</sup>, Leicester<sup>6</sup>, Madrid<sup>7</sup> and Belgrade<sup>8</sup> “*pre-moots*”, which gave the team the necessary tools to build a strong case and the possibility to improve the members’ confidence and posture in front of a panel of experienced arbitrators.

In conclusion, the whole competition process, which encompasses both written and oral phases, requires an extensive amount of daily hard work. Nevertheless, all the effort spent during those six months of preparation paid off.

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## Our perspective

The Vis Moot experience will definitely never be forgotten. At first, even after receiving a lot of motivational words from different practitioners, ex-mooties and professors we were still sceptical about the personal and professional growth we could achieve through this competition. Now, looking back, we realise that the six months of hard work and full dedication brought us even further than what was portrayed.

On a professional level, we were able to improve our skills, both oral and written. While writing the *memoranda*, the opportunity to develop strategies, identify weaknesses and search for authorities and legal support for both parties enhanced our flexibility. This challenge certainly has been crucial to consolidate our professional skills. In addition, the oral pleadings played the distinctive role of challenging us to step out of our comfort zone. Our advocating style, posture and team work had not yet been tested. This competition allowed us to discover these new abilities and to keep on improving until the last hearing. We are certainly grateful,

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<sup>5</sup> Organized by the Portuguese Arbitration Association in cooperation with the Arbitration Centre of the Portuguese Chamber of Commerce and Industry.

<sup>6</sup> NOVA Faculty of Law attended to the Gentium Law Pre-Moot via Skype, which was organized by the University of Leicester.

<sup>7</sup> Madrid Pre-Moot is organized by ACMEY, Asociación para la Cultura del Mooting – El Yunque, <https://acmeyuc3m.wordpress.com/madrid-pre-moot/> (last visited on 19<sup>th</sup> April, 2:30 pm).

<sup>8</sup> XI Belgrade Open Pre-Moot is considered the biggest and most worthwhile pre-moot. This year, it was held at the University of Belgrade Faculty of Law, in which seventy teams from different countries participated. Information available at <http://www.ius.bg.ac.rs/moot/premoot.htm> (last visited on 27<sup>th</sup> April, 10:23 am).

since, probably, not many people get a chance to improve as much in such a short period of time.

We can not disregard the social interactions during this period, which in the end were also rewarding. In fact, the cultural diversity of the Vis Moot makes the social events especially enriching and a unique environment to meet practitioners and build prospective successful professional relationships.

We definitely had a great time during this experience. However, in our perspective, in any event of such dimension, there is always place for improvement. One of the main issues that the Vis Moot organization faces during the first four days of competition is the tribunal's composition. Due to the increasing number of teams participating, every year it becomes more difficult to provide panels composed by arbitrators with experience in the arbitration field and enough knowledge on the applicable law and rules, capable to understand the dimension of "*the Problem*" and contribute with relevant questions during the hearings.

Frequently, many teams, after weeks of hard work and preparation, have the misfortune to be scored by a tribunal composed by arbitrators with less experience or arbitrators that don't understand yet very well the mechanism of the Vis Moot, or even arbitrators that don't have sufficient knowledge regarding "*The Problem*". Any of this hypothesis would be extremely unfair to students that have put so much effort and have spent so many hours working and preparing themselves for the oral hearings.

Moreover, the Vis Moot organization allows the coaches of the teams to participate as arbitrators in the competition. This particular situation, on one hand, can be seen as an advantage, since the coaches' profound knowledge on the case can contribute to relevant and adequate questions which allows students to really shine by showing not only their awareness on the case but also the months of case law and doctrine research. However, on the other hand, the coaches' participation has also its downside since sometimes their impartiality can be put into question.

In view of the above and considering the impact that the composition of the arbitral tribunal has in the teams' performance and evaluation, it is necessary to guarantee that it is composed by experienced arbitrators that take the time to carefully read all relevant documents.

Another issue that, in our view, needs improvement is the scoring method that has been used. A panel composed by three arbitrators combined with the fact that each arbitrator must score each student from a scale of 0 to 100, can sometimes originate some unfairness to the teams. In fact, not only are there hundreds of arbitrators, but also subjective elements in the scoring sheet to be analysed, such as teamwork and posture of the students. In turn, the scoring

can become rather arbitrary since in a same panel each arbitrator can attribute a very discrepant score, which in the end can undermine a team's possibility to qualify for the next round. Problems such as this one have happened in previous years and once again happened in this year's competition, which was especially alarming since around twenty teams did not have the chance<sup>9</sup> to make the round of 64<sup>10</sup> due to discretionary scores.

In order to solve issues such as this one, a modification in the scoring method could be considered, and for this reason we present two possible solutions: first, we believe that it would be fairer and more adequate if the arbitrators, instead of scoring the students, had to make three choices: a) they would rank the students present in the pleading between them from worse to best; b) the arbitrators would decide which team would win the hearing; c), decide if the team should make it to the round of 64. Regarding the first choice, the arbitrators would rank each student from 1 to 4 (being 4 the highest)<sup>11</sup>.

Second, to reduce the possibility of outstanding discrepancies, it could be instituted the rule according to which the arbitrators could not attribute scores that vary between them on more than 10 points. This would mean that the scores would be discussed within the panel and that the result would be more balanced.

In our view, the combination of both suggestions would be the most adequate solution since it would be easier for arbitrators to decide which team wins "*the battle*" and consequently it would prevent unjust situations as the one explained above.

In conclusion, the Vis Moot, being an event with the involvement of about two thousand people, has naturally room for improvement. However, these suggestions do not diminish the success that, year after year, it has achieved through the commitment of its organization.

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### ***"The Problem"***

Every year, the organization of the Vis Moot releases "*The Problem*" to the teams, which portrays "*hot*" topics of international commercial arbitration and international sale of goods. This year there was no exception: in October, a complex and detailed record was made

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<sup>9</sup> In this last edition, before the announcement of the top 64, the Vis Moot organization stated that 20 teams did not have the opportunity to pass to the next round since in some hearings arbitrators attributed scores with gaps of up to thirty points.

<sup>10</sup> After each team participating in four general rounds, the teams that get the best sixty-four scores qualify to the next phase: the knockout rounds.

<sup>11</sup> This solution has been brought up by Tony Cole in "*Ordinal ranking and the Vis Moot*" available at <https://www.linkedin.com/pulse/ordinal-ranking-vis-moot-tony-cole-fciarb/> (last visited on 3<sup>rd</sup> May, 4:00 pm).



available to all students enrolled, which included the parties' notice of arbitration and response to notice of arbitration, general conditions and codes of conduct, a witness statement, a newspaper article, among other interesting elements.

This 25<sup>th</sup> edition embraced the procedural issues of the possibility of having an appointing authority deciding on a challenge of an arbitrator (a) and the presence of a third-party funder, which had been behind multiple appointments of the arbitrator, as a ground to raise that same challenge (b). Concerning the merits of the case, the two issues that were meant to be addressed concerned the requirements for the incorporation of standard terms into a contract, to conclude if whether Claimant's or Respondent's were applicable (c), and the concept of conformity of goods under Article 35 (1) CISG when the supplier is obliged to deliver goods containing ethical and sustainable sourced ingredients (d).

Before we address all these matters, they first need to be put into context through a brief exposure of the facts presented in "*The Problem*".

The parties, Delicatesy Whole Foods Sp (a manufacturer of baking products) and Comestible Finos (a gourmet supermarket chain), met in early 2014 at a food fair, where they approached their shared concerns about sustainable and ethical sourcing. Later, Respondent's Head of Purchasing, Ms. Annabelle Ming, initiated a tender process in order to secure a supplier of chocolate cakes. This tender was not only published in a newspaper, but also sent directly to specific potential partners, Claimant included.

The main elements that composed this tender were Respondent's General Conditions of Contract, its Code of Conduct and its General Business Philosophy. In the set sent to Claimant, a letter emphasized Respondent's willingness to contract with it, since it was an expert in the monitoring of supply chains and was also a member of Global Compact<sup>12</sup>. In addition, the tender documents contained an *ad hoc* arbitration clause.

Upon receiving such invitation to tender, Claimant was requested to deliver a signed Letter of Acknowledgement, expressing its intent to submit a proposal in "*accordance with the specified requirements*", which it promptly did.

It was only after returning the letter that Claimant sent a proper offer to Respondent, which was also introduced by a cover letter, specifying the modifications introduced. It was stated that these related primarily to the shape of the cake, which needed to be different, and to the payment conditions, since the payment period would be shorter than what was expected

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<sup>12</sup> The United Nations Global Compact is the world's largest corporate sustainability initiative, according to its website: <https://www.unglobalcompact.org/> (last visited on 30<sup>th</sup> April, 8:00 pm). It establishes 10 Principles (including sustainability and anti-corruption) which the companies shall respect in the pursuit of their activities.

under Respondent's tender documents. This letter also contained Claimant's approval regarding the arbitration clause and a general reference to Claimant's applicable sustainability strategy. In the offer itself, a reference was made to Claimant's standard terms: "*The above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World*". The information on such conditions could be found in Claimant's website, which was indicated in the next line. Finally, Respondent's tender documents were attached to Claimant's offer, but the only blank spaces that had been filled in regarded the parties' identification.

In Respondent's reply, it accepted the proposed modifications, by specifically mentioning the different shape of the cake as well as the different payment conditions. It also stated it had read the other party's standard terms "*out of curiosity*".

The deliveries agreed upon were fulfilled throughout the following years and it was only in 2017 that a newspaper revealed that Ruritania Peoples' Cocoa was in violation of the standards agreed upon by the parties. This was the company hired by Claimant to provide the cocoa beans used in the production of the chocolate cakes. The unravelling of this international scandal occurred when a corruption scheme involving members of the government was dismantled. Permits were illegally issued to burn protected areas in order to broaden the plantation field.

Claimant was surprised when alerted by Respondent about this information, since it had not only hired an expert auditing company, Egimus AG, to assess the supplier's compliance with the Global Compact Principles, but had also required Ruritania People's Cocoa to fill out questionnaires.

Considering it had the right to avoid the contract, due to lack of conformity of the goods, Respondent refused to pay the outstanding price of 1.200.000 US\$ for the 600.000 cakes delivered and not yet paid. Consequently, Claimant started the present arbitral proceedings, nominating Mr. Prasad as an arbitrator.

In its declaration of independence and impartiality, Mr. Prasad revealed that it had been previously appointed on two occasions by Mr. Fasttrack's law firm (Mr. Fasttrack is Claimant's lawyer in the present arbitral proceedings). This circumstance was approached by Respondent in its response to notice of arbitration, by stating that it had no objection to that fact.

On August 2017, Respondent obtained reliable information regarding Claimant's intention to hide the fact that its claims were being funded by a third-party funder. Consequently, Respondent requested the Arbitral Tribunal to order the disclosure of the funder's identity. The Tribunal complied with such request and Claimant later revealed that the funder was a company called Funding 12, Ltd., whose main shareholder was Findfunds LP.

Upon gaining knowledge of this information, Mr. Prasad disclosed to the parties and the Arbitral Tribunal its previous connections to this funding entity: it had been previously nominated as arbitrator in two cases funded by other subsidiaries of Findfunds LP. Furthermore, he informed that his law firm was merging with another firm, Slowfood, and that one of the former partners of this firm was representing a client in an arbitration that had also been funded by Findfunds LP.

Given these circumstances, Respondent submitted a notice of challenge of this arbitrator.

Taking into account all the facts mentioned, the students were required to address the following issues:

- (a) Should the Arbitral Tribunal decide on the challenge of Mr. Prasad and if so with or without his participation?
- (b) In case the Arbitral Tribunal has authority to decide on the challenge, should Mr. Prasad be removed from the Arbitral Tribunal?
- (c) Which standard conditions govern the contract, Claimant's or Respondent's or none of them?
- (d) In case Respondent's General Conditions are applicable, has Claimant delivered non-conforming goods pursuant to Article 35 CISG as the cocoa was not farmed in accordance with the ethical standards underlying the General Conditions and the Code of Conduct for Suppliers, or was Claimant merely obliged to use its best efforts to ensure compliance by its suppliers?

Our approach to these questions was thoroughly devised in both *memoranda*. Firstly, as Claimant, it was upheld that: it should be an appointing authority deciding on the challenge, pursuant to Article 13 (4) UNCITRAL Arbitration Rules, with the subsidiary claim that if the Arbitral Tribunal should decide then it would be with Mr. Prasad's participation, in order to respect the parties' agreement on the composition of the Tribunal (a); Mr. Prasad should not be removed by the Arbitral Tribunal as the grounds raised by Respondent are devoid of any merits (b); Claimant's standard terms are applicable since they were validly incorporated (c); and, finally, the cakes delivered by Claimant are conforming to the contract even if Respondent's terms were to be applied, since a mere obligation of best efforts was at hand (d).

On the contrary, the *memorandum* for Respondent sustained that: the Arbitral Tribunal should decide on the challenge of Mr. Prasad, without his participation, pursuant to Article 13

(2) UNCITRAL Model Law (a); Mr. Prasad should be removed from the Arbitral Tribunal as there are justifiable grounds as to his independence and impartiality (b); Respondent's standard terms govern the contract, since Claimant did not validly incorporate its own terms (c); and, at last, that the cakes delivered were non-conforming to the contract due to the violation of the sustainability, ethical and anti-corruption standards agreed upon by the parties (d).

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## The Issues

At this time, we shall look over each one of these matters and proceed to a more detailed analysis of the juridical complications of the answers provided in the *memoranda*.

Issue 1: Should the **Arbitral Tribunal decide on the challenge** of Mr. Prasad and if so **with or without his participation**?

The first procedural issue addresses the competence of an appointing authority to decide the challenge of an arbitrator. Regarding this issue, the parties have dissenting approaches: while Claimant stands for the competence of an appointing authority, on the contrary, Respondent argues that the Arbitral Tribunal is the competent body to decide upon Mr. Prasad's challenge. If the arbitral tribunal is indeed competent, then another procedural issue arises: whether Mr. Prasad should be part of the arbitral tribunal deciding on his own challenge.

As to the first part of this issue, the parties have agreed upon an *ad hoc* arbitration clause, applying the UNCITRAL Rules, to resolve any dispute arising out of the contract: “Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution and excluding the application, direct or by analogy, of the UNCITRAL Rules on Transparency”.

The arbitration clause is based on the model clause suggested by UNCITRAL with one important modification: instead of allowing an appointing authority to decide on the challenge, the parties explicitly provided that the arbitration shall occur without the involvement of any arbitral institution. The reason for this explicit exclusion was the fact that, in the past, Respondent had a bad experience with institution arbitration. The modification of the arbitration clause was discussed between both parties' representatives, Ms. Ming and Mr. Tsai, since Claimant had previously made the opposite decision, changing from *ad hoc* arbitration

to institutional arbitration. Nevertheless, in the end, no changes were made to the arbitration clause.

After the beginning of the arbitral proceedings, Respondent came across crucial information regarding the presence of a third-party funder in the proceedings. Later, following Respondent's request, the Arbitral Tribunal demanded Claimant to disclose the funder's identity, which lead Respondent to challenge Mr. Prasad based on his previous connections with Findfunds LP. Furthermore, during the course of the proceedings, an issue concerning the proper constitution of the Arbitral Tribunal arose when Respondent, on its Notice of Challenge, argued whether the application of Article 13 (4) UNCITRAL Rules was against the parties' expressed agreement. This rule determines that: "*If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority (emphasis added)*". While Respondent sustains that this rule should not be applicable since the wording of the arbitration clause encompasses the exclusion of any arbitral institution, including a potential appointing authority, Claimant's position is that Article 13 (4) UNCITRAL Rules must be applied and therefore the appointing authority is the competent body to decide the challenge. These considerations should be assessed together with the intent of the parties when drafting the arbitration clause.

In case Respondent's position prevails, which means that the arbitral tribunal is the competent body to decide the challenge, another question regarding the composition of the arbitral tribunal must be answered. In this second part of the issue, the participation of Mr. Prasad on his own challenge is analysed. In this regard, Claimant argues once again that the wording of the arbitration agreement must be respected. The agreement establishes that the number of arbitrators to decide the dispute shall be three, consequently, it is Claimant's position that Mr. Prasad must be part of the arbitral tribunal deciding the challenge. Contrarily, Respondent states that if Mr. Prasad participated on his own challenge he would be acting as a judge on his own cause and ultimately breaching the established principle of "*nemo iudex in causa sua*", which stands for: no one should be a judge on his own cause.

Issue 2: In case the Arbitral Tribunal has authority to decide on the challenge, **should Mr. Prasad be removed** from the Arbitral Tribunal?

The second procedural issue regards the grounds for Mr. Prasad's challenge. Claimant appointed Mr. Prasad in the notice of arbitration and Respondent accepted such nomination. However, when Respondent examined the metadata of the electronic version of the notice of arbitration, it discovered the following deleted comment written by Mr. Fasttrack: *"Verify with Findfunds whether there exist any contacts between Mr Prasad and Findfunds. If contacts exist we should definitely do our best to keep the funding secret and not disclose it to the Respondent, to avoid potential challenges of Mr Prasad. Prasad, whom I know from two previous arbitrations, is the perfect arbitrator for our case given his view expressed in an article on the irrelevance of CSR on the question of the conformity of goods"*. This commentary made Respondent question the circumstances behind Mr. Prasad's appointment.

In addition, following the disclosure of the funder's identity, Mr. Prasad revealed that he was not aware of the presence of the funder but he had previous connections with the funder's subsidiaries. Consequently, all these circumstances together lead Respondent to raise, pursuant to Article 12 (1) UNCITRAL Rules, Mr. Prasad's challenge.

There are four circumstances that can be addressed in the present challenge. However, a preliminary issue that needs to be discussed is the applicability of the IBA Guidelines on Conflict of Interest. Even though the parties have not expressly agreed on their application in the arbitration agreement, these have been considered an important tool since they reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality or independence.

The first ground concerns the involvement of a third-party funder in the arbitral proceedings. The topic of third-party funding is recent, therefore it remains without a proper regulation. Nevertheless, there are many authorities and case law that cover this issue. In the present case, Claimant did not disclose that its claims were being funded. On one hand, the rule applicable to the proceedings, UNCITRAL Rules, does not predict a duty to disclose. On the other hand, the IBA Guidelines on Conflict of Interest and the transparency principle impose this duty. This possible failure of disclosure shall be assessed taking into consideration whether the challenge of an arbitrator can be focused only on the arbitrator's behaviour or should be an overall assessment, including the parties' behaviour. Another question that needs to be answered, regarding the third-party funding, is whether the funder can be considered a party in

the proceedings or if it is just a third party. In this regard, the IBA Guidelines determine that the funders who have an interest in the final award bear the identity of the party<sup>13</sup>.

In addition to that, Mr. Prasad has participated in two arbitrations also funded by subsidiaries of Findfunds LP in the last three years. The issue of repeated appointments is a frequent topic in international arbitration. The soft law, specifically the IBA Guidelines, has a narrow approach to these circumstances. The IBA Guidelines on Conflict of Interest Red, Orange and Green Lists contain a set of circumstances that may represent a conflict of interest. The fact that an arbitrator has, in the last three years, been appointed as arbitrator on two or more than two times, by one of the parties or an affiliate of one of the parties<sup>14</sup>, can give rise to doubts as to the arbitrator's independence and impartiality. Nevertheless, one can argue that the repeated appointments of an arbitrator enhances his qualities instead of giving rise to doubts as to his independence and impartiality. What furthermore needs to be discussed is whether each subsidiary represents a different legal entity, and therefore the appointment was not made solely by one entity, or if they all bear the identity of the mother company, Findfunds LP.

The second circumstance that should be analysed in this challenge concerns the activity of the arbitrator's law firm. Currently, Mr. Prasad's law firm has an ongoing arbitration involving another subsidiary of Findfunds LP. This circumstance can disqualify an arbitrator pursuant to the IBA Guidelines' waivable Red List<sup>15</sup>. Although Mr. Prasad has taken all the necessary precautions to avoid any contact with that case, there is still an oral hearing to take place and it is assumed that another 300.000 US\$ will become due. Furthermore, on that case, the law firm has already charged 1.5 million US\$ over the last two years, which means that the funder is an important client to the law firm. While on one hand, this case represents only 5% of the law firm's annual turn, on the other hand, one can argue that this is a financially important relationship that Mr. Prasad, as an equity partner, may want to maintain.

The third circumstance is related to the law firm of Claimant's representative, Fasttrack and Partners. In the last three years, Mr. Prasad has been appointed two times by Mr. Fasttrack's law firm. In these two situations, Mr. Fasttrack was not directly involved in the cases but gave advice to the colleague running the case and recommended Mr. Prasad as arbitrator in the second arbitration. It can be argued that Mr. Fasttrack's involvement in Mr. Prasad's appointments is dubious and can therefore give rise to justifiable doubts when taken jointly

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<sup>13</sup> IBA Guidelines on Conflict of Interest, Part I: General Standards Regarding Impartiality, Independence and Disclosure, standard 6 (b).

<sup>14</sup> IBA Guidelines on Conflict of Interest, Orange List, standard 3.1.3.

<sup>15</sup> IBA Guidelines on Conflict of Interest, Orange List, standard 2.3.6.

with the other circumstances. On the contrary, it is questionable whether the challenge is solely focused on the arbitrator's behaviour or on the set of circumstances surrounding the challenge.

The last circumstance concerns an arbitrator's public opinion. It is a common practice for arbitrators to publicly express their view on certain topics and even the IBA Guidelines describe this circumstance in the Green List,<sup>16</sup> which does not represent a conflict of interest. However, in this case, Mr. Prasad has an article in which he expresses his view on a crucial legal question of the case. Furthermore, the metadata that Respondent retrieved from Claimant's notice of arbitration contained a comment expressing that Mr. Prasad was the "*perfect arbitrator*" for this case due to his view in this particular article. Therefore, this can be a final ground for the challenge.

Finally, the grounds for the challenge may be assessed either jointly or individually, which may ultimately affect the success of the challenge.

**Issue 3: Which standard conditions govern the contract,** Claimant's or Respondent's or none of them?

The first substantive issue encompasses the requirements of an effective incorporation of standard terms into an international sales contract.

The parties have agreed to apply the CISG to the supply contract. This statute was implemented between contracting States as a way to facilitate, standardize and to introduce certainty into international sales contracts and it sets a careful balance between the interests of the buyer and of the seller<sup>17</sup>. To pursue this purpose, it establishes the default rules on contract formation (Part II), on obligations imposed on the seller and on the buyer, as well as accessible remedies in case of breach by either party (all included in Part III entitled "*Sale of goods*"). In order to solve the issue at hand, the rules on contract formation must be analysed as they may provide an answer to this incorporation requirements conundrum.

Unfortunately, the CISG solely determines what is requested for an offer<sup>18</sup> and an acceptance<sup>19</sup> to be considered valid and effective and is silent concerning the incorporation of standard terms. To fill the gap in this section, one has to resort to Article 8, which embodies

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<sup>16</sup> IBA Guidelines on Conflict of Interest, Green List, standard 4.1.1.

<sup>17</sup> Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html) (last visited on 7<sup>th</sup> May, 6:15 pm).

<sup>18</sup> Articles 14 to 17 and 24 of the United Nations Convention on Contracts for the International Sale of Goods.

<sup>19</sup> Articles 18 to 24 of the United Nations Convention on Contracts for the International Sale of Goods.



the principle of interpretation by referring to the parties' intent, negotiations and to the understanding of a reasonable person. This void in the convention is, nevertheless, frequently approached by state courts as it is relatively common for the parties in international contracts to attempt to incorporate their own conditions and codes of conduct. Therefore, the case law may be a helpful tool to establish the suitable expression of one's intent pursuant to Article 8.

The leading case in this matter was decided by the German Federal Supreme Court, in 2001, and was entitled "*The Machinery case*"<sup>20</sup>. The parties had also celebrated a contract subject to the CISG and the seller, on the written confirmation order, made a reference to the applicability of its own standard terms. The court decided on the invalidity of this integration based on two main reasons: the first one was that the seller had not expressed its intention in a clear way to the buyer, not giving him a reasonable opportunity to object; and the second was the insufficiency of a mere reference, as the seller should have provided the terms directly or otherwise made them available. The state courts from other signatory countries followed this reasoning<sup>21</sup> and these two requisites are now largely accepted as stages into a valid incorporation of standard terms. In the present situation, the problem however surpasses this clarification since, although the terms were not attached to Claimant's offer, there was a hyperlink to the company's website, where the terms could easily be found. Regarding this specific situation, authors have dissenting opinions about whether that is satisfactory for an incorporation to be valid.

In order to rule on this issue, it is necessary to consider the intent of the parties during the negotiations but having in mind that this intent is relevant to the extent that the parties expressed it in clear way, pursuant to Article 8 (2) CISG. Therefore, a decision is relying on whether one of the parties was clearer than the other, and whether Claimant's reference to its website was enough to bind Respondent to those documents.

Finally, one parallel issue can not remain unmentioned. In the Arbitrator's Brief there was an indication that the students should refer to the "*battle of forms*" situation. This is a legal mechanism that emerges when both parties attempt to incorporate their own standard terms into the contract, without attempting to negotiate their clauses. When applying the CISG, most

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<sup>20</sup> Germany 31 October 2001, Supreme Court, available at <http://cisgw3.law.pace.edu/cases/011031g1.html> last visited on 7<sup>th</sup> May, 8:25 pm).

<sup>21</sup> For example, "*The Sesame Seeds case*" decided by the Netherlands District Court Utrecht in 21 January 2009, available at <http://cisgw3.law.pace.edu/cases/090121n1.html> (last visited on 7<sup>th</sup> May, 9:00 pm), and "*Fresh-Life International B.V. v. Cobana Fruchtring GmbH & Co., KG*" decided by the Netherlands District Court Rotterdam in 25 February 2009, available at <http://cisgw3.law.pace.edu/cases/090225n1.html> (last visited on 7<sup>th</sup> May, 9:15 pm).

authors resort to Article 19 in order to solve this “battle”, as this article provides the solution for replies to offers than contain modifications. This is certainly the most common background for a “battle of forms”: a party submits an offer in which it mentions its standard terms, and the other party replies by referring to its own terms. However, in the present situation, the parties attempted to apply their own terms by submitting an invitation to make offers (Respondent) and an offer (Claimant). Consequently, it is the team’s conviction that we could only address the situation as one of “battle of forms” if we interpreted Respondent’s tender as a proper offer, and Claimant’s reply as a counter-offer.

Issue 4: In case Respondent’s General Conditions are applicable, **did Claimant still fully comply with its contractual obligations?**

This second substantive issue aims to address two main topics. The first one, regarding Claimant’s compliance with its obligation of delivering conforming goods, through the interpretation of Article 35 CISG. The second, concerning what was in fact imposed by the contract signed between the parties - whether an obligation of best efforts or an obligation of results.

Although the answer for the first legal challenge might appear, at first sight, relatively simple, it might take a thorough analysis of Article 35 in order to find if Claimant delivered the right goods: “*which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract*”<sup>22</sup>.

In some cases, it is simple to identify the conformity of the goods contracted. However, in more complex cases, such as this one, the buyer can expect more than what can be embodied in goods. This appears to reflect Respondent’s expectation, since the negotiations established not only that the cakes would be fit for the purpose of eating but also that the cakes would be produced in a sustainable way.

The CISG secretariat<sup>23</sup> and scholars such as Fritz Enderlein and Dietrich Maskow, sustain that, in order to find the standard for conformity, one needs to access the contract between the parties. In addition, these distinguish authors state that the wording of Article 35

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<sup>22</sup> Article 35 of the United Nations Convention on Contracts for the International Sale of Goods.

<sup>23</sup> Secretariat Commentary (closest counterpart to an Official Commentary), available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html> (last visited on 6<sup>th</sup> May, 5:00 pm).

CISG - “*quality, quantity and description*” - is used as a supplement, as the specific requirements should be deduced from the purpose and circumstances of the contract<sup>24</sup>.

Thus, it is unequivocal that the verification of conformity depends primarily on what the parties have agreed upon, which, in the present case, was to deliver goods that met the requirements of sustainability set in parties’ Codes of Conduct and in the Global Compact Principles that both parties were members of and committed to.

The assessment of conformity is strictly linked to the aforementioned second topic of this fourth issue, which regards the degree of compliance imposed by the contract. It is evident that Claimant had an obligation of delivering the right goods, but the question here is: which is the nature of that obligation? More precisely, which obligation was imposed by the contract, a best efforts obligation or, on the contrary, an obligation of results?

The complex way in which “*The Problem*” is drafted allows strong arguments to be presented by both sides. On one hand, Claimant can defend itself based on the fact that the wording of Respondent’s Code of Conduct expresses an obligation of best efforts. Firstly, because it has terms such as “*make sure*”, “*responsible manner*” and “*avoid*” that can be argued as indicating an obligation of best efforts. Secondly, because Respondent’s Code of Conduct allows the application of a comparable code in which concerns the relationship between Claimant and its suppliers, and this comparable code could be Claimant’s Code which has an obligation of best efforts. On the other hand, Respondent claims that its own Code of Conduct contemplates an obligation of results and that Claimant was aware of that. Firstly, due to the fact that throughout all the negotiation process, Claimant knew that it was paramount for Respondent to produce goods that were sustainably sourced. Secondly, because the wording of its Code, with words such as “*zero tolerance*”, “*make sure*” and “*guarantee*” leaves allegedly no doubt that Claimant had to guarantee a result.

While Respondent terminates the contract based on the lack of compliance by its supplier pursuant to Article 35 CISG, Claimant asserts its right to receive the price for the chocolate cakes delivered and not yet paid, stating that the goods delivered were conforming with the contract since the obligation at hand was the one of best efforts and this was fully accomplished by Claimant.

In order to develop this line of argumentation, would be prudent for students to analyse the concept of duty of best efforts to find whether Claimant actually complied with such duty.

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<sup>24</sup> International Sales Law - United Nations Convention on Contracts for the International Sales of Goods - Prof. Dr. jur. Dr. sc. oec. Fritz Enderlein and Prof. Dr. jur. Dr. sc. oec. Dietrich Maskow.

The CISG does not contemplate the requirements for compliance with this obligation. Therefore, since UNIDROIT principles is the subsidiary law agreed between the parties, one has to resort to Article 5.1.4 in order to acknowledge that the obligation of best efforts binds the party “*to make such efforts as would be made by a reasonable person would do of the same kind in the same circumstances*”. Once again, each party has its own strategy. Claimant may state that Respondent shall be considered a person of the same kind, in the same circumstances and that was also not able to foresee the corruption scandal. In addition, it hired a company specialized on giving opinion on Global Compact compliance which certified that Claimant’s supplier was suitable to perform the contract. In this situation, Respondent might argue that, even if the obligation at hand was the one of best efforts, Claimant still would not have complied with it since the company hired, as mentioned above, had not in its scope the ability to evaluate the certification method chosen by Claimant.

In this edition, there was an opportunity to give a final strike in the oral hearings both by Claimant, when stating that Respondent used the cakes to promote its image even after claiming its alleged lack of conformity, and by Respondent, when arguing that it was the one who warned Claimant about a scandal involving its own supplier and published on a newspaper based on Claimant’s country.

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## **Conclusion**

After six months of hard work and dedication, the 25<sup>th</sup> Vis Moot has finally come to an end. Through countless pleadings, conferences, new countries and unforgettable memories, the competition revealed itself to be much more than we would have ever expected it to. Besides presenting us with a remarkable academic opportunity, it was also a deeply enriching social experience.

The Vis Moot allowed us to interact with a group of outstanding students and practitioners, responsible for making it not only the most prestigious competition of international commercial arbitration, but also an encounter of admirable human beings who are buildings bridges between different cultures and providing all those who are interested in arbitration with the unique experience which is exploring this brave new world.

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## **ANNEXES:**

*Memorandum* for Claimant and *Memorandum*  
for Respondent by the Faculty of Law of  
NOVA University of Lisbon's team

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TWENTY- FIFTH ANNUAL  
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

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**NOVA FACULTY OF LAW UNIVERSITY OF LISBON**



**MEMORANDUM FOR CLAIMANT**

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**On Behalf Of:**

Delicatesy Whole Foods Sp  
39 Marie-Antoine Carême Avenue  
Oceanside  
Equatoriana

**CLAIMANT**

**Against:**

Comestibles Finos Ltd  
75 Martha Stewart Drive  
Capital City  
Mediterraneo

**RESPONDENT**

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*Counsel for CLAIMANT*

Bruna Corby • Jamily Gomes • Jenny Medina • Madalena Palha • Sara Margarida Freitas

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**I. In the Arbitration Agreement, Claimant and Respondent agreed to the application of the UNCITRAL Arbitration Rules, which includes the challenge procedure provided by Art.13(4)** **5**

**A. The challenge shall be decided by an appointing authority, without the involvement of an arbitral institution** \_\_\_\_\_ **5**

**B. The confidentiality intended by Claimant and Respondent with the exclusion of an arbitral institution remains preserved with the involvement of an appointing authority** \_\_\_\_\_ **6**

**II. Even if the application of Art.13(4) is excluded, the default procedure provided by Art.13(2) UNCITRAL Model Law establishes that the challenge shall be decided by the full Arbitral Tribunal with the inclusion of Mr. Prasad** \_\_\_\_\_ **7**

**A. Respondent's request for the Challenge to be decided by the two remaining arbitrators violates Arbitration Agreement and the principle of parties' autonomy** \_\_\_\_\_ **8**

**B. Pursuant to Art.13(2) of UNCITRAL Model Law, Mr. Prasad shall be part of the Arbitral Tribunal deciding his challenge** \_\_\_\_\_ **8**

**C. Mr. Prasad's challenge is a mere delay manoeuvre to setback the arbitration proceedings** \_\_\_\_\_ **9**

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<b>§</b>	Paragraph
<b>Art.</b>	Article
<b>Arts.</b>	Articles
<b>CC</b>	Code of Conduct/ Codes of Conduct
<b>CCS</b>	Code of Conduct for Suppliers
<b>CISG</b>	United Nations Convention on Contracts for the International Sale of Goods
<b>Cl.</b>	Claimant
<b>Exb</b>	Exhibit
<b>GCC</b>	General Conditions of Contract
<b>GCS</b>	General Conditions of Sale
<b>GC</b>	Global Compact
<b>IBA</b>	International Bar Association
<b>ISO</b>	International Organization for Standardization
<b>LofA</b>	Letter of Acknowledgment
<b>LP</b>	Limited Partnership
<b>Ltd</b>	Limited
<b>Mr.</b>	Mister
<b>Ms.</b>	Miss

<b><i>NofA</i></b>	Notice of Arbitration
<b><i>NofC</i></b>	Notice of Challenge
<b>Ord.</b>	Order
<b>PCA</b>	Permanent Court of Arbitration
<b>p.</b>	Page
<b>pp.</b>	Pages
<b>PO1</b>	Procedural Order n.1
<b>PO2</b>	Procedural Order n.2
<b>Proc.</b>	Procedural
<b>Resp.</b>	Respondent
<b>Req. Arb.</b>	Request for Arbitration
<b>UN</b>	United Nations
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNIDROIT</b>	International Institute for the Unification of Private Law
<b>USD</b>	United State Dollars
<b>v.</b>	Versus

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## STATEMENT OF FACTS

### **The Parties**

1. Delicatesy Whole Foods Sp ("Claimant") is a medium sized manufacturer of fine bakery products registered in Equatoriana. Comestibles Finos Ltd ("Respondent") is a gourmet supermarket chain in Mediterraneo.

### **The Agreement**

2. On March 2014, Claimant and Respondent met at the Danubian Food Fair (between 3-6), during which Mr. Tsai, Claimant's Head of Production, and Ms. Ming, Respondent Head of Purchase, discussed a possible supply contract. Consequently, on 10 March 2014, Respondent sent an invitation letter to tender, which contained its General Conditions of Sale, Code of Conduct and General Business Philosophy among other documents. As requested by Respondent, in order to express its intent to submit an offer, on 17 March 2014, Claimant signed and sent the Letter of Acknowledgment.

3. On 27 March 2014, Claimant sent its offer to Respondent expressly subjecting it to its General Conditions of Sale and its Codes of Conduct and proposed some changes to the tender documents. Respondent not only accepted this proposal (on 7 April 2014) but also praised Claimant's impressive Codes, appreciating the shared values of sustainability, fair trade and human rights.

### **The breach of the agreement by Respondent**

4. Later on (19 January 2017), Respondent came across a report of a UNEP Special Rapporteur, through Equatoriana State News Channel, investigating the growing deforestation in Ruritania. In this report, it was suggested that the local cocoa farmers in Ruritania had been violating the principles of sustainable farming by perpetrating the crimes of fraud and corruption. Once Respondent acknowledged the existence of the said report, it questioned Claimant about its suppliers' adherence to the production standard agreed upon and announced the suspension of further payment until the issue was solved, because it considered Claimant was in breach of the contract.

5. After hearing from Ruritania Peoples Cocoa mbH, Claimant regrettably confirmed with Respondent that its supplier had breached its obligations towards Claimant and was, in fact, involved in the corruption scandal. However, in the same email, Claimant announced that it had already secured other suppliers so that it could continue complying with its obligations towards the contract.

6. Claimant was very surprised with Ruritania's breach, since it had previously received positive report regarding Ruritania Peoples Cocoa mbH's production from Egimus AG, a

company hired by Claimant specialized in providing expert opinion on Global Compact compliance. It had also received reliable certificates and documentation asserting the compliance with sustainability standards. Immediately after this event, Respondent unlawfully announced the avoidance of the contract. Given this unfortunate situation Claimant promptly offered a price reduction on the cakes delivered and not yet paid.

7. Respondent refused Claimant's suggestion alleging damages to its reputation. However, Claimant found out that the same cakes were used by Respondent to promote the opening of three new shops.

### **The arbitral proceedings**

8. Respondent, by refusing to make further payment and declaring the contract avoided, made inevitable the initiation of the arbitral proceedings, pursuant to Claimant and Respondent's Arbitration Agreement. Therefore, on 30 June 2017, Claimant filed the Notice of Arbitration seeking the payment of the cakes not yet paid plus damages.

9. Attached to the Notice of Arbitration was the declaration of impartiality and independence of the Claimant's appointed-arbitrator, Rodrigo Prasad, where he disclosed that he had been previously appointed two times as arbitrator by Claimant's lawyer's law firm, Fasttrack & Partners.

10. On 31 July 2017, Respondent submitted its response to the notice of arbitration, in which Mr. Prasad's nomination was acknowledged and expressly accepted. In the following month, on 29 August 2017, Respondent requested the Arbitral Tribunal to order Claimant to disclose any relevant information regarding the fund financing its claims. The presiding arbitrator, Ms. Caroline Rizzo, complied with Respondent's request and on 7 September 2017, Claimant declared that its claim was funded by Funding 12 Ltd and that its main shareholder was FindFunds LP.

11. Mr. Prasad, who became aware of this information only at that time, submitted to the Parties and the Arbitral Tribunal a letter informing that he had acted as arbitrator in two cases which were funded by other subsidiaries of Findfunds LP. In addition, he disclosed that his law firm recently merged with Slowfood, a leading law firm in Ruritania to form Prasad & Slowfood. In this regard, one of the former Slowfood partners, and now Prasad & Slowfood's partner, is currently representing a client in an arbitration, which is funded by one of Findfunds LP subsidiaries.

12. Subsequently, Respondent challenged Mr. Prasad alleging lack of impartiality and independence. However, considering the groundless challenge in question, Mr. Prasad decided not to withdraw from his office as arbitrator.



## SUMMARY OF ARGUMENTS

**PART 1: THE TRIBUNAL SHALL FOLLOW THE PROVISION OF ART. 13(4) OF THE UNCITRAL RULES. IF THE TRIBUNAL UNDERSTANDS OTHERWISE, THE CHALLENGE SHALL BE DECIDED BY AN ARBITRAL TRIBUNAL COMPOSED BY THREE ARBITRATORS, WITH THE INCLUSION OF MR. PRASAD**

**13.** The Arbitration Agreement provides for the application of the UNCITRAL Arbitration Rules as whole. Thus, Mr. Prasad's challenge shall be decided by an appointing authority and without the involvement of an arbitral institution, in accordance with art. 13(4) UNCITRAL Rules. If the Arbitral Tribunal understands that Claimant and Respondent intended to exclude the challenge procedure provided by art. 13(4) UNCITRAL Rules, then the challenge shall be decided in accordance with art. 13(2) UNCITRAL Model Law, i.e. by the Arbitral Tribunal with Mr. Prasad's participation. In light of this, the Arbitral Tribunal shall refuse Respondent's request for the challenge to be decided by the two remaining arbitrators, otherwise the Arbitration Agreement will be violated.

**PART 2: MR. PRASAD SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL**

**14.** Mr. Prasad's challenge must be decided in accordance with the art.12(1) UNCITRAL Rules, as provided by the parties in the Arbitration Agreement. The IBA Guidelines are not applicable to this case. In fact, they only have a guidance function. Furthermore, even if the IBA Guidelines were applicable, there are no grounds for Mr. Prasad to be challenged since his previous appointments by Fasttrack & Partners are not "problematic" as Respondent defends. Additionally, neither does Mr. Prasad's previous arbitration proceedings funded by Findfunds LP subsidiaries constitute doubts to his independence and impartiality, nor are there grounds for Mr. Prasad's disqualification.

**PART 3: THE CONTRACT SHALL BE GOVERNED BY CLAIMANT'S GENERAL CONDITIONS**

**15.** Claimant and Respondent have concluded a contract by which the former would supply chocolate cakes to the latter. Both companies rely on their respective General Conditions and Codes of Conduct when negotiating, since they establish a wide range of sustainability and fair trade principles to be respected in their contracts. However, on this specific contract, Respondent invited Claimant to tender for this contract, accepted Claimant's offer and clearly agreed that the applicable terms would be the ones set out in Claimant's conditions and codes, since they reflected Respondent's own values and were even largely comparable to those set forth in its own code. On the other hand, if this Tribunal decides to resort the "*battle of*

*forms*” to resolve this issue, the same terms are applicable by virtue of the widely accepted “*last-shot rule*”.

**PART 4: IN CASE RESPONDENT’S GENERAL CONDITIONS ARE APPLICABLE CLAIMANT STILL FULLY COMPLIED WITH ITS CONTRACTUAL OBLIGATIONS**

**16.** Respondent’s General Conditions of Contract and Code of Conduct give Claimant the opportunity to select a comparable set of terms for its suppliers to adhere to. Because there is an undisputable similarity between both parties’ codes, Claimant rightfully decided to apply its own. This set of terms establishes a mere means obligations towards compliance with the sustainability principles by Claimant’s suppliers. For this reason, along with the inexhaustible effort Claimant made to assure compliance with the agreed principles, the cakes are conforming to the contract since they reflect a conduct that was fully pursuant to the contract.

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**PART 1: THE TRIBUNAL SHALL FOLLOW THE PROVISION OF ART. 13(4) OF THE UNCITRAL RULES. IF THE TRIBUNAL UNDERSTANDS OTHERWISE, THE CHALLENGE SHALL BE DECIDED BY THE ARBITRAL TRIBUNAL COMPOSED BY ITS THREE MEMBERS, WITH THE INCLUSION OF MR. PRASAD**

**17.** On 14 September 2017, Claimant was noticed of the challenge procedure initiated by Respondent against its nominated arbitrator, Rodrigo Prasad. In the *NofC* Respondent claims that the Arbitration Agreement provides for the *ad hoc* nature of the arbitration procedure and that no arbitral institution can be involved in the proceedings. Hence, Respondent defends that it should be considered that the Parties agreed for the exclusion of the application of the challenge procedure provided in Art.13(4) [*NofC*, p.39 §8; *NofA*, Clause 20, p.6] and, consequently, that the challenge should be decided by the Arbitral Tribunal without Mr. Prasad’s participation [*NofC*, p.39 §8].

**18.** Nevertheless, Respondent’s arguments cannot be deemed valid. Indeed, Respondent’s position constitutes a violation of the Arbitration Agreement, since Claimant and Respondent agreed to the application of the UNCITRAL Rules as whole, including the challenge procedure provided by Art.13(4), which does not necessarily imply the involvement of an arbitral institution (I). Furthermore, even if the Tribunal understands the opposite, pursuant the UNCITRAL Model Law Art.13(2), that would be considered as a default rule, the challenge would have to be decided by the full Arbitral Tribunal with the participation of Mr. Prasad (II).

**I. IN THE ARBITRATION AGREEMENT, CLAIMANT AND RESPONDENT AGREED TO THE APPLICATION OF THE UNCITRAL ARBITRATION RULES, WHICH INCLUDES THE CHALLENGE PROCEDURE PROVIDED BY ART.13(4)**

**19.** The Arbitration Agreement expressly establishes that all disputes shall be settled in accordance with UNCITRAL Rules and without the involvement of any arbitral institution [*NofA, Clause 20, p.6; Redfern/Hunter, p.157*]. Claimant and Respondent are sophisticated parties who employed experienced lawyers to draft their contract, including the dispute resolution clause [*NofA, Clause 20, p.6; Roadway Package System, Inc. v. Scott Kayser d/b/a Quality Express*]. At more, the agreement was for the exclusion of the application of the UNCITRAL Rules on Transparency [*NofA, Clause 20, p.6*].

**20.** If Claimant and Respondent intended to exclude the application of Art.13(4), which entails the challenge procedure, they would have obviously made it clear in the Arbitration Agreement as they rightly do regarding the Rules on Transparency [*Roadway Package System, Inc. v. Scott Kayser d/b/a Quality Express*]; which was not the case. In this sense, the Arbitral Tribunal shall understand that Mr. Prasad's challenge must be decided by an appointing authority, without the involvement of an arbitral institution (**A**); even more, the confidentiality intended by Claimant and Respondent, with the exclusion of an arbitral institution, remains preserved with the involvement of an appointing authority (**B**).

**A. THE CHALLENGE SHALL BE DECIDED BY AN APPOINTING AUTHORITY, WITHOUT THE INVOLVEMENT OF AN ARBITRAL INSTITUTION**

**21.** Contrary to what Respondent attempts to defend, a decision on the arbitrators' challenge by an appointing authority, as determined in art. Art.13(4) UNCITRAL Rules, does not necessarily imply the involvement of an arbitral institution within the arbitral proceedings [*NofC, p.39 §8*]. In fact, according to Art.6(1), besides an arbitral institution or a trade association, parties can also nominate as appointing authority any other professional organization, natural person or the state courts to decide the challenge [*Lew/Mistelis/Kröll, p.239; NofA, Clause 20, p.6*]. Therefore, Claimant and Respondent are free to choose whichever appointing authority they consider appropriate [*Lew/Mistelis/Kröll, p.239*], not being bounded to choose an arbitral institution.

**22.** Moreover, under Art.13(4) UNCITRAL Rules the Arbitral Tribunal has no power to decide on the challenges of its own members [*Paulsson/Petrochilos, p.94*]. The UNCITRAL Rules entrusted the task to decide the challenge to an appointing authority exactly in order to avoid any unnecessary delay of the proceedings [*Lew/Mistelis/Kröll, p.240*]. This is to say that, in order to avoid a halt situation and in favour of efficiency [*Paulsson/Petrochilos, p.69*],

Claimant and Respondent shall agree upon the name of an appointing authority, according to Art.6(1) UNCITRAL Rules [*NofA, Clause 20, p.6; Lew/Mistelis/Kröll, p. 239; Grimmer, p.502*] which may not, and does not have, to be an arbitral institution.

**23.** If parties are not able to reach an agreement upon the nomination of an appointing authority, Claimant may request the Secretary-General of the Permanent Court of Arbitration to designate an appointing authority – which does not have to be an arbitral institution – in accordance with Art.6(2) UNCITRAL Rules.

**24.** In truth, Art.6(2) UNCITRAL Rules specifically identifies the Secretary-General as the designating authority of the appointing authority, in order to ensure that the arbitral proceedings are not subjected to undesired delay tactics [*Caron/Caplan, p.301*]. As explained below, nevertheless, being the case that parties had excluded the involvement of any arbitral institution, [*NofA, Clause 20, p.6*], the challenge must be decided by the Arbitral Tribunal with participation of Mr. Prasad [*Art.13(2) UNCITRAL Rules*].

**B. THE CONFIDENTIALITY INTENDED BY CLAIMANT AND RESPONDENT WITH THE EXCLUSION OF AN ARBITRAL INSTITUTION REMAINS PRESERVED WITH THE INVOLVEMENT OF AN APPOINTING AUTHORITY**

**25.** Given the fact that the appointing authority would be bounded by its own confidentiality duties, Respondent's concern that the dispute would not be kept confidential is unfounded [*NofC, p.38 §8*].

**26.** Although the Arbitration Agreement is silent regarding confidentiality, the statements made by Mr. Tsai and Ms. Ming's throughout the negotiations demonstrates an intent to protect a confidentiality interest when providing for *ad hoc* arbitration in the dispute resolution clause [*NofA, p.4 §3; NofA, Clause 20, p.6*], which Claimant does not contest. Claimant and Respondent intended to protect their image as participants of international trade, avoid leaks of information during or after the arbitration.

**27.** Such parties' intention must be, thus, appreciated in accordance with the law that governs the rest of the contract [*Redfern/Hunter, p.158*], which is CISG [*POI, p.48 §4*]. In light of this, the Arbitration Agreement, shall be interpreted in accordance with the principles of internationality, uniformity and good faith in the interpretation and application of uniform law [*Art.7(1) CISG; Viscasillas, p.289, p.292*].

**28.** However, the information necessary for the appointing authority to decide the challenge is narrower; i.e. only concerns to Mr. Prasad's appointment process and his statements regarding the circumstances that Respondent consider constitute justifiable doubts to his independence and impartiality [*Cl. Exb. C11, p.23 §4; Response to NofA §22, p.26; NofC, pp.38-39*].

Therefore, Respondent's concern regarding the confidentiality of the information related to the merits at dispute is empty.

**29.** Furthermore, the privacy of the challenge procedure is held to imply the confidentiality of what is disclosed in those proceedings, as an implied obligation of the Arbitration Agreement [*Born*, p.89, p.2792; *Redfern/Hunter*, p.124; *Hassneh Ins. Co. of Israel v. Mew*; *Ali Shipping Corp. v. Shipyard Trogir*]. The role of an appointing authority is of procedural aid to avoid delays in the arbitration proceedings, with no decision-making power, interfering in the arbitration process only in exceptional circumstances [*Grimmer*, p.516]. In other words, the appointing authority is bounded by its own confidentiality duty and, for this reason, the confidentiality intended by Respondent would not be breached.

**II. EVEN IF THE APPLICATION OF ART.13(4) IS EXCLUDED, THE DEFAULT PROCEDURE PROVIDED BY ART.13(2) UNCITRAL MODEL LAW ESTABLISHES THAT THE CHALLENGE SHALL BE DECIDED BY THE FULL ARBITRAL TRIBUNAL WITH THE INCLUSION OF MR. PRASAD**

**30.** In case the Arbitral Tribunal considers that the challenge falls within the Arbitral Tribunal's competence, Respondent's request for the Challenge shall be decided with Mr. Prasad's participation, otherwise the Arbitration Agreement would be violated [*NofC*, p.39 §8].

**31.** The seat of arbitration is often intended to serve as the legal centre of gravity, being undisputed that an arbitration procedure is also governed by the law of the place which is held [*Redfern/Hunter*, pp.171-175]. Thus, Mr. Prasad's challenge may be decided in accordance with the law of the seat of the arbitration, Danubian Law, which is a *verbatim* adoption of the UNCITRAL Model Law.

**32.** In this scenario, accordingly to Art.13(2) UNCITRAL Model Law, the challenge must be decided by the full Arbitral Tribunal with the participation of the challenged arbitrator, Mr. Prasad. Otherwise, the Arbitral Tribunal will be complying with Respondent's delay manoeuvre to setback the arbitration proceedings.

**33.** The Arbitral Tribunal shall see that Respondent's request for the Challenge to be decided by the two remaining arbitrators violates Arbitration Agreement and the principle of parties' autonomy (A). Furthermore, pursuant to Art.13(2) of UNCITRAL Model Law, Mr. Prasad shall be part of the Arbitral Tribunal which is deciding his challenge (B), otherwise it will not be composed by three members. Finally, as consequence of Respondent's disloyal conduct, Mr. Prasad's challenge is a mere delay manoeuvre to setback the arbitration proceedings (C).

**A. RESPONDENT’S REQUEST FOR THE CHALLENGE TO BE DECIDED BY THE TWO REMAINING ARBITRATORS VIOLATES ARBITRATION AGREEMENT AND THE PRINCIPLE OF PARTIES’ AUTONOMY**

**34.** Claimant’s request for the challenge to be decided by the two members of the Arbitral Tribunal clearly disregards the arbitration clause and, therefore, the principle of parties’ autonomy.

**35.** Firstly, Claimant and Respondent, pursuant to the principle of party autonomy – the principal controller of the appointment process [*Lew/Mistelis/Kröll*, p.236] – expressly provided in the Arbitration Agreement for the number of arbitral members, as well as how the appointment of the arbitrators should take place [*NofA*, Clause 20(b), p.6].

**36.** Secondly, the Danubian Arbitration Law (Model Law) [*POI*, p.49 §4] recognizes in Art.10(1) a general principle that the parties’ agreement regarding selection of arbitrators must be given effect. Hence, this principle applies to Claimant and Respondent’s agreement concerning the number of arbitrators [*NofA*, Clause 20 (a), p.6; *Born*, p.1654], meaning that the Arbitral Tribunal deciding the challenge shall be constituted by three arbitrators, with the inclusion of Mr. Prasad.

**37.** The wording provided by the Arbitration Agreement leads to the conclusion that an Arbitral Tribunal constituted by an even number of arbitrators is undesired [*NofA*, Clause 20 (a), p.6; *Born*, p.1674]. In fact, a decision made by the remaining two arbitrators would not be considered as a collective deliberative process, instead it would constitute a decision by a sole arbitrator [*Born*, p.1923, p.1972]. Therefore, besides violating Claimant and Respondent’s agreement, if Mr. Prasad’s fellow arbitrators do not reach an agreement on the challenge, the Arbitral Tribunal constituted by an uneven number becomes a formula for deadlock and uncertainty [*Born*, p.1674; *Dickenmann*, p.384].

**38.** In other words, pursuant to art. V(1)(d) New York Convention, if the award would be rendered by the remaining two arbitrators [*NofA*, Clause 20(a), p.6], Claimant would be entitled to request it to be set aside due to an irregular constitution of the Arbitral Tribunal. The award would simply neither comply with the Arbitration Agreement, nor with the law of the country where the arbitration is seated [*Born*, p.1642].

**B. PURSUANT TO ART.13(2) OF UNCITRAL MODEL LAW, MR. PRASAD SHALL BE PART OF THE ARBITRAL TRIBUNAL DECIDING HIS CHALLENGE**

**39.** Finally, Claimant and Respondent consented in the Arbitration Agreement that the seat of arbitration should be Danubia, Vindabona [*NofA*, Clause 20(b), p.6]. Therefore, taking into account that these proceedings are also subject to the national arbitration legislation of the

arbitral seat [*Born, pp.1530-1531*] and that Danubia adopts the UNCITRAL Model Law, Art.13(2) shall be applicable.

**40.** In fact, if the Arbitral Tribunal understands that Claimant and Respondent intended to exclude the application of the challenge procedure provided by UNCITRAL Rules, thus, Mr. Prasad's challenge shall rely on the procedure of Art.13(2) of the UNCITRAL Model Law [*Lew/Mistelis/Kröll, p.239; POI, p.49 §4*].

**41.** This is so because, in accordance with the mentioned Art.13(2), is the Arbitral Tribunal fully composed and with the inclusion of Mr. Prasad which has the competence to decide on this challenge [*Lew/Mistelis/Kröll, p.309; Dal/Keutgen, p.62*]. Any decision otherwise constitutes a violation the Arbitration Agreement's provision of an Arbitral Tribunal composed by its three members [*NofA, Clause 20(a), p.6*].

**42.** Furthermore, the decision on the challenge shall be made in accordance with Art. 29 UNCITRAL Model Law, i.e., by a majority of all members [*Lew/Mistelis, p.639*]. In fact, one must bear in mind that the vote of Mr. Prasad on his own challenge may always be overruled by his two fellow arbitrators [*Berger, p.504*]. In light of this, Mr. Prasad would never act as a judge in its own cause, since a final decision on the challenge would always demand the majority of the vote of all its members.

**C. MR. PRASAD'S CHALLENGE IS A MERE DELAY MANOEUVRE TO SETBACK THE ARBITRATION PROCEEDINGS**

**43.** Last but not the least, besides the ungrounded arguments (that will be explained below) the Respondent's request in the *NofA* shall be seen as purely dilatory, pursued with the single purpose of setting back the arbitration proceedings and postponing the order of payment of the amount long overdue [*Fasttrack Letter, p.45*]. Opposite to Respondent, since the beginning of the dispute Claimant has demonstrated its commitment to avoid any delays, with suggestion for immediate appointment of a potential substitute arbitrator [*Fasttrack Letter, p.46*].

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**CONCLUSION OF THE FIRST PART**

**44.** According to the Arbitration Agreement, Claimant and Respondent agreed to the application of the UNCITRAL Arbitration Rules as whole, as such the challenge shall be decided by an appointing authority, as provided by Art.13(4). Nevertheless, if the Arbitral Tribunal understands otherwise, the challenge shall be always decided by the Arbitral Tribunal composed by its three members, with the inclusion of Mr. Prasad. Any other solution would irremediably violate the arbitration clause agreed between the parties pursuant to the

principle of party autonomy, as well the Arbitral Tribunal's duty to ensure that the award can be enforced.

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**PART 2: MR. PRASAD SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL**

**45.** Respondent challenged Mr. Prasad on the grounds that it has alleged serious and justifiable doubts as to his impartiality and independence. The challenge is based on two different arguments: Mr. Prasad's repeated appointments by a law firm, which in Respondent's opinion are "*problematic*" and that Mr Prasad's partner is currently participating in an arbitration case funded by Findfunds LP, which should disqualify the arbitrator according to the IBA Guidelines paragraph 2.3.6. Hence, Respondent requested the Arbitral Tribunal to take into account the IBA Guidelines on Conflict of Interests in International Arbitration [*NofC*, p.38 §9]. However, as explained below, the challenge must be decided in accordance with the UNCITRAL Rules rather than the IBA Guidelines **(I)** and even if the IBA were applicable, there are no grounds to challenge Mr. Prasad **(II)**.

**I. THE CHALLENGE PROCEDURE SHALL BE DECIDED IN ACCORDANCE WITH THE UNCITRAL RULES RATHER THAN IBA GUIDELINES ON CONFLICT OF INTEREST**

**46.** Respondent asserts that the Tribunal should take into account the IBA Guidelines on Conflict of Interests when deciding the challenge; however, the rule applicable to the challenge is the UNCITRAL Rules, which provides for an objective standard **(A)**; Since neither the Arbitral Tribunal nor the parties in Arbitration Agreement have agreed upon the application of the IBA Guidelines, they are not applicable to this case **(B)**.

**A. MR. PRASAD'S CHALLENGE MUST BE DECIDED IN ACCORDANCE WITH UNCITRAL RULES ART.12(1)**

**47.** Claimant and Respondent, in the Arbitration Agreement [*NofA*, Clause 20, p.6], established that the the UNCITRAL Rules are applicable to the dispute. Hence, the challenge of Mr. Prasad, as a procedural issue, must be decided in accordance with the Art.12(1) of the UNCITRAL Rules, which establishes the standard for the "*challenge of arbitrators*".

**48.** Regarding the arbitrator's challenge, the UNCITRAL Rules adopt an objective standard according to which disclosure is required of facts or circumstances that, from the point of view of a reasonable third party, rather than one of the parties or arbitrators, are likely to give rise to doubts as to the arbitrator's independence or impartiality [*Daele*, p.24; *Born*, p.1780].

**49.** Thus, even though Respondent attempts to justify the challenge of Mr. Prasad with a subjective approach, based on 'his eyes' [*NofC*, p.39 §10], it is the objective reasonableness that is ultimately determinative [*Caron/Caplan*, p.208; *Aguas de Barcelona SA v. Argentine*



*Republic; ICS Inspection and Control Services Ltd v. Argentine Republic*]. As explained below, the circumstances of this case are not sufficiently serious to give rise to objectively justifiable doubts as to Mr. Prasad independence and impartiality.

#### **B. THE IBA GUIDELINES ARE NOT APPLICABLE TO THIS CASE**

**50.** The IBA Guidelines in order to be legally-binding, parties or the Arbitral Tribunal need to expressly provided for their application in the arbitration agreement, however this was not the case (1); furthermore, a disclosure does not imply the existence of doubts as to arbitrator's impartiality and independence (2).

##### **1. The IBA Guidelines are not legally-binding, they only have a guidance function**

**51.** The IBA Guidelines on Conflict of Interests do not have the force of statutory law [*IBA Guidelines on Conflict of Interests*, p.3 §6; *Born*, p.1839; *Berger*, p.496; *Lüth/Wagner*, p.418; *Conoco Phillips Co. and others v. Bolivarian Republic of Venezuela*; *The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland*]. In contrast with the IBA Rules on the Taking of Evidence in International Arbitration, the designation as conflict of interest guidelines confirms its guidance function, not contractually-binding [*Born*, p.1839; *Tidewater v. Venezuela*]. As such, they only have a guidance and inspiration function, which does not bind neither the courts nor the Arbitral Tribunal.

**52.** The Rules applicable to this arbitration, UNCITRAL Rules [*NofA*, Clause 20, p.6], establish in Art.1(1) that the parties may make modifications regarding its application, which is a result of the party autonomy principle in the arbitration procedure [*Redfern/Hunter*, p.355; *Born*, p.2130; *Lew/Mistelis/Kröll*, p. 523]. In addition, the Model Law Art.19(1) also enshrines the party autonomy principle when providing that they are free to agree on the procedure to be follow. Thus, parties are free to determine and make changes regarding the applicable rules to their procedure. Which simply did not happen the present case: Claimant and Respondent failed to expressly provide for the use for the IBA Guidelines.

**53.** Similarly, the Arbitral Tribunal, due to its procedural discretion to conduct the arbitration as it considers appropriate, pursuant to Art.17(1) UNCITRAL Rules, could have provided for the application of the IBA Guidelines afterwards during the case management with the parties [*Rizzo Letter*, p.34] or in the procedural orders [*PO1*, § 48-49; *PO2*, §50-55]. However, the Arbitral Tribunal was also silent regarding the application of the IBA Guidelines.

**54.** The IBA Guidelines could only be considered as binding provisions if the parties and the Arbitral Tribunal expressly agree upon their application to the proceedings [*Goeler*, p.257]. In this case, Claimant and Respondent are sophisticated parties, – well-known business companies in the market with previous arbitration experience [*Cl. Exb. C1*, p.8, §5; *Resp.*

*Exb. R5, p.41 §5*] – and they have mentioned relevant arbitration instruments, such as the UNIDROIT Principles, the UNCITRAL Rules [*NofA, Clause 20, p.6*], and expressly excluded the application of UNCITRAL Rules on Transparency [*Baysand Inc. v. Toshiba Corporation*]. Hence, if the Parties wanted to be bound by the IBA Guidelines they could have had provided for the use of the IBA Guidelines as binding provisions. Nevertheless, they chose not to do so.

**55.** All in all, parties had the chance to modify the rules applicable to the procedure, providing for the use of the IBA Guidelines in their arbitration agreement. However, since Claimant and Respondent chose to not provide for the application of the IBA Guidelines, they can only have a guidance function, serving solely as inspiration.

**2. An arbitrator's disclosure does not indicate the existence of a conflict of interest, neither automatically disqualify the arbitrator**

**56.** The IBA Guidelines must be applied on a case by case basis considering all the circumstances of the case [*IBA Guidelines on Conflict of Interest, p. 19; W Ltd v. M SDN BHD*]. In light of this, a disclosure does not constitute an admission of the existence of a conflict of interest [*Daele, p.6; IBA Guidelines on Conflict of Interest, p.18*]. Quite the opposite, the purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively there are justifiable doubts as to the arbitrator's impartiality or independence [*IBA Guidelines on Conflict of Interest, p.18*]. Afterwards, the parties will evaluate this information and decide if there are justifiable doubts.

**57.** If an arbitrator feels that there is a conflict of interests that may put in risk his independence, he should refuse the appointment rather than disclose any information.

**58.** In fact, the disclosure of Mr. Prasad does not imply the existence of doubts as to his independence and impartiality [*IBA Guidelines on Conflict of Interest, p.iii*], conversely enhances the fact that he considers himself independent and impartial of the parties and feels capable to perform his duties, otherwise he could have resigned or declined his nomination [*IBA Guidelines on Conflict of Interest, p.8 §3(c)*].

**59.** Additionally, the standard for disclosure differs from the standard for challenge [*IBA Guidelines on Conflict of Interest, p.iii*]. Thus, it is important to underline that the circumstances disclosed by an arbitrator shall not be equated with a ground for challenge [*Berger, p.495*]. The disclosure itself does not imply sufficient doubts to disqualify the arbitrators, or even creates a presumption in favour of disqualification [*IBA Guidelines on Conflict of Interest, p.8 §3(c)*].

**60.** Summing up, a challenge may only be successful if an objective test based on the Art.12(1) UNCITRAL Rules is met. However, this is not the case: the disclosure of the information made by Mr. Prasad does not imply the existence of doubts as to his independence and impartiality, neither automatically disqualify Mr. Prasad. In fact, his attitude enhances his commitment to his obligations as arbitrator.

**II. EVEN IF THE IBA GUIDELINES WERE APPLICABLE, THERE ARE NO GROUNDS FOR MR. PRASAD TO BE CHALLENGED**

**61.** As explained, the grounds for challenge differs from the ground for disclosure. Thus Mr. Prasad's disclosures does not constitute an admission of the existence of a conflict of interest neither shall constitute grounds for challenge.

**62.** None of allegedly grounds on which Respondent's founds Mr. Prasad's challenge constitutes a reason for challenge: First, Mr. Prasad previous appointments by Fasttrack & Partners are not "*problematic*" (A). Secondly, there is no legal duty for Claimant to disclose the third-party funder, also Mr. Prasad could not disclose this information since he had no previous knowledge of this fact (B). Finally, Mr. Prasad's partner current arbitration neither constitutes ground to disqualification nor puts in risk Mr Prasad impartiality and independence (C).

**A. MR PRASAD PREVIOUS APPOINTMENTS BY MR. FASTTRACK 'S LAW FIRM ARE NOT PROBLEMATIC**

**63.** The previous appointments of Mr Prasad do not constitute a problematic situation, (instead they actually reflect his qualities and experience as an arbitrator). Moreover, Respondent accepted Mr. Prasad declaration of independence and impartiality, in which he disclosed his previous appointments (1). Also, the requirements set up in the IBA Guidelines are not fulfilled in this case (2). Finally, Mr Prasad is not financially dependent of Fasttrack & Partners (3).

**1. Respondent made no objections when Mr. Prasad was appointed, despite his disclosure on previous nominations by Fasttrack & Partners**

**64.** On 30 June 2017 in the *NofA* Claimant nominated Mr. Prasad as arbitrator [*NofA p.4*] and attached his declaration of impartiality and independence [*Cl. Exb. C11, p.23*], which contained a detailed disclosure of his previous relationships with Mr. Fasttrack law firm. The UNCITRAL Rules Art.13(1) provides a 15 days time-limit to challenge an arbitrator, counting from the moment of the acknowledgment of the circumstances that may constitute justifiable doubts to its independence and impartiality. In this sense, when Respondent

accepted Mr. Prasad's appointment on 31 July 2017 in the Response to *NofA*, the 15 days time-limit mentioned above was already precluded.

**65.** Furthermore, in Response to the Notice of Arbitration, Respondent did not make any objections regarding the information disclosed by Mr. Prasad, quite the contrary, Respondent acknowledged the facts and expressly accepted Mr. Prasad's nomination [*Response to NofA*, p.26 §22]. Thus, Respondent forfeited its right to invoke this reason for challenge at a later time [*Swiss Supreme Court*, 4A\_256/2009] since it has not promptly objected to his nomination [*Born*, p.1918].

## **2. The IBA Guidelines standard 3.3.8 requirements are not fulfilled by the present case**

**66.** According to the IBA Guidelines standard 3.3.8, encompassed in the Orange List, the arbitrator shall disclose if he has, within the past three years, been appointed on more than three occasions by the same law firm. However, the challenge of Mr. Prasad on this grounds has no basis, since he has been previously appointed only two times in the last two years by Fasttrack & Partners [*Cl. Exb. C11*, p.23 §3], which does not comply with the limits provided by standard 3.3.8 of the IBA Guidelines.

**67.** Moreover, these two previous arbitrations where Mr. Prasad served as arbitrator are completed by now [*Cl. Exb. C11*, p.23 §3] and Mr Fasttrack has not been directly involved in neither of them [*Cl. Exb. C11* p.23 §.4; *PO2*, p.51 §9], therefore such appointments do not have any kind of influence to this procedure. In addition, the mere fact of holding previous arbitral appointments by the same party simply does not, without more, indicate a manifest lack of independence or impartiality [*Tidewater v. Venezuela*], quite the contrary. The previous appointments of Mr. Prasad emphasize his qualities and experience as an arbitrator rather than raising doubts to his independence and impartiality [*Koh*, p.718].

**68.** Furthermore, it is important to clarify that the standard for disclosure differs from the standard for challenge [*IBA Guidelines on Conflict of Interest*, p.iii]. Thus, the circumstances disclosed by an arbitrator do not constitute an admission of the existence of a conflict of interest [*Daele*, p.6; *IBA Guidelines on Conflict of Interest*, p.18] or imply the existence of doubts as to his independence and impartiality [*IBA Guidelines on Conflict of Interest*, p.8 §3(c), p.iii]. Consequently, Mr. Prasad's disclosure about his previous nominations by Fasttrack & Partners does not constitute grounds for a challenge.

## **3. Also, Mr Prasad is not financially dependent of Fasttrack & Partners**

**69.** Claimant and Respondent are free to choose an arbitrator with whom they were satisfied with his performance as arbitrator in the past [*Rivera-Lupu/Timmins*, p.104], as a result of the

party autonomy principle. Moreover, if Mr. Prasad complied with his duty to disclose under Art.11 UNCITRAL Rules.

**70.** In repeated appointments cases, the number of earlier assignments and their scope are significant factors to take into consideration, nevertheless an overall assessment must be made taking also into account all the circumstances in each particular case [*Koh*, p.718; *Korsnäs Aktiebolag v. AB Fortum Värme samägt med Stockholms stad*; *Tidewater v. Venezuela*]. In Mr Prasad's case, the two previous arbitrations where Mr. Prasad was indicated as arbitrator are completed by now [*Cl. Exb. C11*, p.23 §3] and Mr Fasttrack has not been directly involved in either of them [*Cl. Exb. C11*, p.23 §4; *PO2*, p.51 §9]. Therefore, in this case, setting a numerical cut-off such as “two or more” or “more than three”, as suggested by Respondent, is arbitrary for it simply avoid a full and proper assessment of the entirety of the circumstances [*Born*, p.1882; case No. A 7145–04, *Stockholm District Court*; *S.A. Fretal v. S.A. ITM Entreprises*].

**71.** Indeed, in order to ensure an overall assessment, another factor that must be key is the existence of a financial dependency of the appointed-arbitrator on the party. Hence, the proportion in which those appointments represent in terms of income provided against the arbitrator's total income shall be of relevance [*Koh*, p.733]. Mr. Prasad has numerous other sources of income, deriving in general between 30% - 40% of his earnings from his work as an arbitrator. Having this percentage in mind, which is less than a half of his incomes, it is easy to conclude that there is no financial dependency between Mr Prasad and Fasttrack & Partners [*OPIC Karimum Corporation v. The Bolivar Republic of Venezuela*].

**B. THE PREVIOUS ARBITRATION PROCEEDINGS FUNDED BY FINDFUNDS LP SUBSIDIARIES DO NOT JEOPARDIZE MR. PRASAD'S INDEPENDENCE AND IMPARTIALITY**

**72.** In the *NofC*, Respondent argues that Claimant had a duty to disclose that is funded by a third-party funder in order to avoid any conflict of interests. However, the challenge procedure must be solely focused on the arbitrator's independence and impartiality and not on the Claimant's duties whatsoever (1). Furthermore, Mr. Prasad had no knowledge of the involvement of a third-party funder (2). Finally, the circumstances around these previous contacts with Findfunds LP subsidiaries do not jeopardize Mr. Prasad independence and impartiality (3).

**1. Parties's behaviour is not relevant when deciding the arbitrator's challenge**

**73.** The challenge procedure must be focused on the arbitrator's impartiality and independence rather than parties behaviour as Respondent claims [*NofC*, pp. 38-39 §6] (Model Law, Art.12(1); UNCITRAL Rules, Art.11). The General Standard 7(a) of the IBA

Guidelines on Conflict of Interests predicts the party's duty to disclose. However, the challenge procedure is not the appropriate procedure to evaluate the parties conduct, since the focus is on whether there are justifiable doubts as to arbitrator's independence and impartiality. In face of this, only the arbitrator's conduct and contacts can be relevant and not that of the appointed-party.

**2. Mr Prasad had no knowledge that Claimant's claims are funded by Funding 12 Ltd**

74. The current rules in international arbitration do not deal adequately with third-party funding issue in an international arbitration context [*Trusz, p.1665*]. Particularly, there is no rule that expressly requires the parties to disclose the presence of a third-party funder in arbitration proceedings [*Rogers, p.210*]. Furthermore, under the Danubian Law and the UNCITRAL Rules [Model Law, Art.12(1); UNCITRAL Rules, Art.11], there is no legal obligation for the parties to make any disclosure, instead these rules establish the arbitrator's general duty to disclose, which was fulfilled by Mr. Prasad immediately after he had knowledge of the involvement of the funder [*Cl. Exb. C11, p.23; Prasad's Declaration, p.36*].

75. Nonetheless, in the event of Mr. Prasad had not made the disclosure of the circumstances above, such would not by itself make him partial or lead to his disqualification [*IBA Guidelines on Conflict of Interest, p. 18, §5; AT&T Corporation v. Saudi Cable Co; Andros Compania Maritime SA v. Marc Rich & Co*].

76. By the time Claimant disclosed the involvement of a third-party funder, Mr. Prasad was not aware of this circumstance [*Prasad's Letter, p.43 §2*]. After the disclosure, Mr. Prasad promptly informed the Arbitral Tribunal and the parties that he has acted as arbitrator in two cases which were funded by Findfunds LP subsidiaries [*Prasad's Declaration, p.36*]. Even Respondent recognizes that Mr. Prasad had no knowledge that Claimant received funding from a third-party funder [*NofC, pp.38-39 §6*]. Therefore, Mr. Prasad, once again, fulfilled the general duty of disclose, which enhances his interest of full transparency.

**3. All in all, the circumstances around the previous connections to Findfunds LP do not lead to justifiable doubts as to Mr. Prasad's independence and impartiality**

77. First, these proceedings are funded by Funding 12 Ltd [*Fasttrack Letter, p. 35 §1*] and not by Findfunds LP, which is a completely separate legal entity. Besides, Findfunds LP does not directly fund any party, the funding activity is exercised by the subsidiaries [*PO2, p.50 §3*]. Thus, Findfunds LP is neither involved in the present arbitration proceedings nor the previous ones where Mr. Prasad acted as arbitrator.

78. Second, Findfunds LP, who is the main shareholder of Funding 12 [*Fasttrack Letter, p. 35 §2*], is known to exercise little influence on the appointment of the arbitrators [*Prasad Letter,*

*p.43 §4; PO2, p.50 §4*]. Therefore, the appointment of Mr. Prasad in the two previous arbitration proceedings was due to his competence and experience, rather than an influence from Findfunds LP.

**79.** Finally, the unanimous awards rendered in the previous arbitrations, in which Mr. Prasad was nominated by Findfunds LP subsidiaries or by Fasttrack law firm, are indicative of his impartiality and independence [*PO2, p.50 §15*]. The Tribunals were constituted by an uneven number of arbitrators and the fact that the decisions were unanimous demonstrates that Mr Prasad did not influence the decisions according to the appointed-party interest.

### **C. THERE ARE NO GROUNDS FOR MR. PRASAD'S DISQUALIFICATION**

**80.** In contrast to Respondent allegations, Prasad & Slowfood does not have a significant commercial relationship with Findfunds LP subsidiary. Therefore, the standard 2.3.6 cannot be invoked as a ground to automatically disqualify Mr. Prasad as an arbitrator. However, as explained below, Respondent intentionally misconstrued the situation.

**81.** First, Findfunds LP is not a party or an affiliate of one of the parties in this case **(1)**. Second, in addition, Mr. Prasad's law firm, which includes his partner, has no significant commercial relationship with any of the parties or any affiliate of the parties, as predicted by IBA Guidelines paragraph 2.3.6 **(2)**. Thirdly, Mr. Prasad has no involvement in the current arbitration in which his partner is participating **(3)**.

#### **1. Since Findfunds LP is not a party or an affiliate in the arbitration, it does not fall within the scope of paragraph 2.3.6 of the IBA Guidelines**

**82.** Respondent asserts that Findfunds LP must be seen as a party or an affiliate of a party under the IBA Guidelines Waivable Red List paragraph 2.3.6. This standard predicts that the arbitrator shall be disqualified if his law firm has a significant commercial relationship with one of the parties or an affiliate of one of the parties. However, a third-party funder is not party to the arbitration proceedings; quite the opposite, it is a neutral or legal person, which cannot be deemed as a party [*ICCA-QMUL Task Force Draft, p.39*]. Furthermore, in order for the third-party funders to be included in the proceedings, Claimant and Respondent would have to provide for their consent in the Arbitration Agreement [*Goeler, p.209*]. Since the dispute resolution clause is silent in this regard, they are a non-signatory to this arbitration agreement [*Nieuwveld/Sahani, p.13; Waincymer, p.607; Racine, p.101*].

**83.** Aside from the fact that funders cannot be considered as parties to the disputes, the third-party funders are neither an affiliate of one of the parties under the four lists mentioned in the IBA Guidelines [*Lévy/Bonnan, p.85*].

**84.** In light of the above, it is quite obvious that the situation of this case does not fall within the scope of paragraph 2.3.6 of the IBA Guidelines, since the third-party funder is not a party or an affiliate as Respondent suggests.

**2. Mr. Prasad's law firm has no significant commercial relationship with Findfunds LP**

**85.** The IBA Guidelines standard 2.3.6 predicts that the arbitrator shall be disqualified if his law firm has a significant commercial relationship with one of the parties or an affiliate of one of the parties. However, Slowfood & Partners law firm has never used a third-party funder before, this is the first time as otherwise the client would not have been able to bring its case [PO2, p.50 §6], thus its participation in the case is a result of a mere necessity of one client and not a regular practice of the law firm.

**86.** Being the very first contact between Slowfood and Findfunds LP, there is no previous relationship that could constitute a significant commercial relationship, thus, this does not constitute a long-standing and continuing commercial relationship [Obe, p.78]. Furthermore, this case represents only 5% of the annual turn of Slowfood in each of the last two years before the merger [PO2, p.50 §6], which is a minor percentage considering the overall income of the law firm, hence do not represent a significant commercial relationship.

**3. There is no involvement of Mr. Prasad in the current arbitration in which his partner is participating**

**87.** Regardless the inexistence of a commercial relationship, the independence and impartiality of Mr. Prasad remains secure since he is not involved in his partner current arbitration.

**88.** After being aware of the participation of Findfunds LP in Mr. Prasad current arbitration, Prasad & Slowfood law firm has taken all the precautions to avoid any contact between Mr. Prasad and the other case. Furthermore, by the time the merger between Prasad & Partners and Slowfood became effective, all the meaningful decisions had already been taken [Fasttrack Letter, p.46 §1; Prasad Letter, p.36 §3]. As so, Mr. Prasad and his law firm have been extremely cautious regarding this situation. There are no valid grounds to allege that these arbitration proceedings constitute a risk to Mr. Prasad independence and impartiality.

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**CONCLUSION OF THE SECOND PART**

**89.** The Arbitral Tribunal shall decide Mr. Prasad's challenge in accordance with Art.12(1) UNCITRAL Rules and not with IBA Guidelines on Conflict of Interests in International Arbitration, since they merely play a guidance function. Furthermore, even if they were applicable, the circumstances of this case do not raise justifiable doubts to Mr. Prasad's



independence and impartiality.

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**PART 3: THE CONTRACT SHALL BE GOVERNED BY CLAIMANT’S GENERAL CONDITIONS OR, SUBSIDIARILY, BY THE GLOBAL COMPACT PRINCIPLES**

**90.** The contract for the supply of Queen’s Delight chocolate cakes was the outcome of thorough negotiations between two sophisticated parties. By expressly agreeing with Claimant’s modifications to the tender documents, Respondent accepted to apply Claimant’s GCS and CC **(I)**. Should this Tribunal reach the conclusion that a “*battle of forms*” occurred, then through the application of the generally accepted “*last-shot rule*”, Claimant’s GCS and CC are still applicable **(II)**.

**I. THE PARTIES INTENDED TO APPLY CLAIMANT’S GENERAL CONDITIONS OF SALE**

**91.** The Tribunal must determine that the contract entered into between the parties on 7 April, 2014, shall be governed by Claimant’s GCS. The negotiations between the parties were defined by an invitation to make an offer from Respondent **(A)**, which requested Claimant to promptly manifest its intent to submit an offer **(B)**, and by a valid offer presented by Claimant **(C)**. Such an offer validly included Claimant’s GCS and CCS, which were later accepted by Respondent **(D)**.

**A. THE TENDER DOCUMENTS PRESENTED BY RESPONDENT CONSTITUTE MERE INVITATIONS TO MAKE OFFERS PURSUANT TO ART.14 CISG**

**92.** A thorough analysis of the tender documents can lead to the conclusion that Respondent set out a tender process in order to receive different offers from potential partners. Aiming to achieve that, Respondent decided to publish the tender documents, not only in industry newsletters, but also to send them directly to five of the businesses Respondent had met at the Cucina food fair, Claimant included [*Response to NofA*, p.25 §7].

**93.** However, Respondent’s publicized tender did not constitute an effective offer. Pursuant to Art.14(2) CISG, proposals which are addressed to the general public, without express indication that they constitute binding offers, are considered as mere invitations to make offers [*Lookofsky*]. Since Respondent clearly did not have an intention to be bound to the general public in case of acceptance, it made a simple invitation to tender [*Enderlein/Maskow; Schlechtriem; Honnold*], which was made to Claimant as well. Therefore, no offer was made.

**1. Respondent sent an invitation to make an offer pursuant to Art.14 CISG when it emailed Claimant directly [*Response to NofA*, p. 25 §7]**

94. When Respondent decided to send the documents directly to Claimant, it could be argued that an effective proposal was made. However, under Art.14(1) CISG, an intention to be bound is required in order for a proposal to be considered an offer [*Honnold; Vural*]. If this requirement fails, the proposal will simply be considered an invitation to make an offer [*Albán*].

95. In fact, the words and expressions used on the tender documents sent to Claimant confirm that Respondent had no intention to be bound by those documents. Firstly, in the email sent to Claimant, on 10 March, 2014, [*Cl. Exb. C1, p.8 §4*] Respondent clearly expressed that a tender process had been initiated and invited Claimant to be part of such process finishing the email with “*I look forward to the submission of your offer and remain*” (emphasis added). Furthermore, in the tender documents, Respondent requests Claimant to read such documents carefully and to return a mere letter of acknowledgment in case Claimant decides “*to tender for this contract*”. Two paragraphs below, Respondent uses the terms “*awarded*” and “*tender evaluation*” which are other indicators of the existence of a tender process and consequent lack of intention to be bound [*Cl. Exb. C2, p.10 §1 and 3*].

96. In addition, the PO2 §23 refers to the documents sent by Respondent as an “*invitation to tender*” and states that Claimant was thereafter the chosen out of all the bidders. This confirms the existence of a tender process and that Respondent was looking for different offers to be presented. At no time did Respondent reveal an intention to be bound.

97. In conclusion, although Respondent alleges that the party initiating a publicized tender sets the terms of the contract [*Response to NofA, p.27 §25*], the fact is that a true contractual offer was not made through a publicized tender; it rather consists of a mere invitation. Furthermore, in Mediterraneo or Equatoriana there is no common trade usage stating that “*the initiator of a tender process can bindingly dictate its General Conditions*” [*PO2, p.55 §44*].

**B. THE LETTER OF ACKNOWLEDGMENT [*RESP. EXB. R1, p.28*] REQUESTED BY RESPONDENT EXPRESSED CLAIMANT’S INTENTION TO MAKE AN OFFER**

98. Respondent alleges that the purpose of the LofA was to guarantee that the offers received from potential partners complied with the tender documents and ensure that a future contract would be governed by Respondent’s GCC and its CCS [*Response to NofA, p.25 §8*]. However, contrarily to Respondent’s allegations, the tender documents provided in by Respondent at no time explained that the LofA had that purpose [*Cl. Exb. C2, p. 10 §1*].

99. According to the Collins English Dictionary, a LofA is “*a letter that you receive from someone, telling you that something you have sent to them has arrived*”. It has no binding force, solely informative value. In the present case, in the letter sent on 17 March, 2014,

Claimant, in the short period (7 days) established by the Respondent [*Cl. Exb. C2, p.10, §1*], not only provided proof that the tender documents were received, but also let Respondent know that it had the intention to make an offer. No other information can be withdrawn from such document.

**C. PURSUANT TO ART.14(1), CISG CLAIMANT'S OFFER FULFILLS ALL THE REQUIREMENTS AND THUS CONSTITUTES A VALID OFFER**

**100.** Art.14(1) CISG determines that in order for a proposal to constitute a valid offer it must be sufficiently definite and must indicate the offeror's intention to be bound in case of acceptance [*Eörsi*].

**101.** Claimant's intention to be bound is absolutely clear, not only because the document is labeled as an offer, but also because of the email sent by Ms. Ming [*Cl. Exb. C3, p.15*] indicating that the offer follows the invitation to tender [*§1*].

**102.** As to the meaning of "*sufficiently definite*", most authors have considered that the formation of the contract following an acceptance requires the proposal to contain the main elements [*Cvetkovik*] when it reaches the offeree.

**103.** Claimant's Sales Offer contains all the essential terms of an offer [price (USD 2,00), quality (Queens' Delight) and quantity of the good (20.000 units per day)] as well as a clear *animus contrahendi* [*Enderlein/Maskow*] as can be seen in Ms. Tsai's letter to which the Offer is attached ["(...) *we have decided to submit a proper offer(...)*", *Cl. Exb. C3, p.15 §4*].

**104.** As to the remaining terms of the contract, Claimant incorporated Respondent's tender documents into its own proposal. In other words, the terms from such documents which were not altered by Claimant, were part of its offer (1). These modifications were clear and included the insertion of Claimant's GCS and CC to govern the contract (2). And hence any reasonable person in Respondent's position, not wanting to be bound to these conditions, would have at the very least objected to it (3).

**1. The tender documents which do not conflict with Claimant's offer are part of it**

**105.** After a more detailed analysis of the documents, it became evident to Claimant that some changes needed to be pursued. For that reason, the email which the Offer is attached to specifically mentions some alterations [*Cl. Exb. C3, p.15 §3 and 4*]. They relate to the goods (form of the chocolate cake) and mode of payment (the payment date was altered), as well as to the inclusion of Claimant's GCS and CC [*Sales Offer*].

**106.** It is stated in the Sales Offer that the offer is subject to the General Conditions of Sale and Claimant's Commitment to a Fairer and Better World. Considering that it is written in the GCS [which Respondent read before accepting the offer (*Cl. Exb. C5, p.17 §3*)], that

*“Delicately Whole Foods will always use its best effort to guarantee that the goods sold match the highest standards in line with its Business Code of Conduct and its Supplier Code of Conduct”*, the Codes were also introduced [PO2, p.53 §29].

## **2. Claimant expressly incorporated its own GCS and CCS in the offer it made**

**107.** Claimant submitted its offer [*Cl. Exb. C4, p.16*] regarding the supply of chocolate cakes. Instead of fulfilling the blank spaces in Respondent’s tender documents and crossing out the terms subject to modification, it made in its offer all the specifications which constituted changes to the tender [PO2, p.52 §27]. However, it attached the set of tender documents to that proposal, because part of these documents were incorporated into the offer (the Specification of the Goods and the Delivery Terms and Special Conditions of Contract).

**108.** On the bottom of the document, Claimant expressly subjects the offer to its GCS and to its Commitment to a Fairer and Better World [PO2, p.52 §27]. Because this commitment is set out in the Codes of Conduct, these are thereby part of the offer as well. Furthermore, throughout approximately 3 years of performance Respondent received invoices with the same statement [PO2, p.52 §24].

**109.** As it has been ruled in previous cases [*Tyco Valves & Controls Distribution GmbH v. Tippins, Inc.*], as long as the standard terms are incorporated into the offer, even if by a mere reference to the website [*Machinery case; Magnus*], giving the other party the possibility of raising the issue of its application, the incorporation is valid. The CISG Advisory Council (Opinion No.13) shares the same view that *“standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms.”* In fact, the standard terms were made available to Respondent by specific reference to the website from which they could be downloaded from.

**110.** In other cases, [*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*] it has been determined that since the GC are contemporaneous to the offer, the party did not sought to impose them after the contract had been formed. Instead, the offer has to be considered as including the applicable terms.

## **3. According to Art.8(2) CISG, a reasonable person in Respondent’s position would have interpreted Claimant’s offer as subject to its GCS and CCS**

**111.** Pursuant to Art.8 CISG, Claimant’s statement is to be interpreted according to its intent where the other party knew or could not have been unaware what that intent was. Because there was a clear inclusion of Claimant’s GCS and CCS, not only by the insertion of the

clause in the sales offer, but also by its implicit reference in the email to which the offer was attached [the expression “*primarily*” in *Cl. Exb. C3, p.15 §3* leads to the obvious conclusion that other changes were pursued], a reasonable and diligent person in Respondent’s position would have objected to such incorporation, if it did not agree with it.

**112.** Indeed, one can not overlook the fact that both are experienced and sophisticated parties. Respondent’s experience and background have to be taken into consideration, since “*it is presumed ex post that a sophisticated party was aware of what to bargain for and read (or should have read) and understood (or should have understood) the terms of a written agreement.*” [Miller]. Thus, the crucial aspect is that Respondent had accessed Claimant’s website, read the standard terms and did not object to them, even though it had the opportunity to do so.

**113.** Indeed to believe that an experienced player acquainted with the international trade market would read Claimant’s offer, (subject to its standard terms) access its website, read its content and confirm the similarity and shared values with its own Code, out of *mere curiosity* - and not understanding that it would be part of the contract - would certainly call into question its expertise.

**D. PURSUANT TO ART.18 CISG, RESPONDENT’S RESPONSE REPRESENTS A CLEAR ACCEPTANCE OF CLAIMANT’S OFFER**

**114.** Under the CISG, “*a declaration of acceptance must coincide with each and every term of an offer in order to conclude a contract.*” [Viscasillas; Farnsworth; Treitel]. In fact, on 7 April, 2014 Respondent not only affirmed that Claimant’s offer had been successful but also accepted the changes suggested by Claimant [“*your tender was successful notwithstanding the changes suggested by you (...)*”, *Cl. Exb. C5, p.17*].

**115.** Respondent also praised Claimant’s impressive CC, by affirming that through the downloading of such Code it realized that both companies share the same values. By doing that, Respondent not only confirmed its awareness of the existence and content of Claimant’s CC, but also accepted that this would be the Code governing the contract, when it did not objected to it [*Frozen Bacon* case].

**116.** Contrarily to Respondent’s allegations, Claimant did not mention for the first time that the contract would be governed by its own GCS, only on 10 February, 2017 [*Response to NofA, p.26 §18*]. Long before that, on 27 March, 2014, Claimant expressly affirmed that its offer was subject to its own GCS, otherwise, it would not have used the following remark on its offer: “**The above offer is subject** to the General Conditions of Sale and our Commitment to a fairer and Better World” (emphasis added) [*Cl. Exb. C4, p.16*]. Furthermore, for

approximately three years Respondent has received invoices, regarding the goods supplied by Claimant, with the same statement, without ever objecting to it.

**117.** It is not understandable how Respondent can allege that a reference to Claimant's GCS occurred for the first time only on 10 February, 2017. After acknowledging and consenting to Claimant's offer, one would naturally expect that Respondent would act accordingly.

**II. IF THIS TRIBUNAL CONCLUDES THAT RESPONDENT DID NOT ACCEPT CLAIMANT'S INCORPORATION OF ITS STANDARD TERMS, THEN THE PARTIES HAVE ENTERED INTO A "BATTLE OF FORMS"**

**118.** Taking into account the fact that after the email sent on 7 April, 2014, the parties initiated their performance, if this Tribunal, upon analysing Respondent's reply concludes that Respondent had no intention to accept the incorporation of Claimant's standard terms under Art.18, then the parties have entered into a "*battle of forms*" (A).

**119.** Although this issue could be resolved under Art.19 CISG [*Schmidt-Kessel*] considering that no objection (counter-offer) was made by Respondent (B), the present conflict shall be resolved according to the subsidiary law chosen by the parties, the UNIDROIT Principles (C).

**A. TRADITIONALLY THE "BATTLE OF FORMS" ISSUE IS RESOLVED IN ACCORDANCE WITH THE CISG**

**120.** The "*battle of forms*" is an expression that refers to a situation in which the parties exchange standard terms (preprinted forms) [*Blodgett*]. Standard terms are provisions which are prepared in advance for general and repeated use by one party (Art.2.1.19 of the UNIDROIT Principles). These are characterized by the absence of negotiation regarding its content with the other party. This requirement is however solely in respect of the terms as a unit, since the specifications of the contract are naturally subject to negotiation.

**121.** In the present case, Respondent's standard terms are: General Conditions of Contract; Special Conditions of the Contract and Code of Conduct for Suppliers. On Claimant's side there are: General Conditions of Sale which necessarily include both Business and Suppliers Code of Conduct.

**122.** The "*battle of forms*" issue can be resolved through the application of different theories, however, there is no consensus among scholars whether this issue falls under the CISG [*Magnus; Piltz; Propane case*] or rather the matter should be resolved by recourse to the applicable national law [*Viscasillas; Fejős; Wildner*].

**B. THE GENERAL PRINCIPLES OF THE CISG AND THE UNIDROIT PRINCIPLES ARE IMPORTANT FOR THE SOLUTION OF THE PRESENT CASE**

**123.** The authors that defend the resolution of the “*battle of forms*” under the CISG, resort to the general rule enshrined in Art.19, to solve the issue [DiMatteo/Dhooge/Greene/Maurer/Pagnattaro]. However, Art.19 CISG applies when during the negotiations between the parties, an offer and counter-offer have occurred. As stated, an analysis of the facts of the present case leads us to the conclusion that only an invitation to make an offer and an offer occurred. No counter-offer in the present case existed, since Respondent did not object to Claimant’s offer when it had opportunity to do so.

**124.** Thus, the CISG general principles are also particularly relevant to determine the issue herein posed, as determined by Art.7(2) CISG [Sarcevic/Volken, pp.234-238]. Since the general principles of the CISG are complemented [Garro; Bonell] by the UNIDROIT Principles, this issue shall be governed in accordance with these. Furthermore, such Principles are also the common domestic law of the parties [POI, p. 49 §4].

**C. ART.2.1.22 OF THE UNIDROIT PRINCIPLES IS APPLICABLE**

**125.** Art.2.1.22 of the UNIDROIT Principles establishes two possible ways to settle the issue of the “*battle of forms*”, depending on the intent of the parties regarding the incorporation of the terms. Generally, the “*knock-out rule*”, which annuls the conflicting terms, is the decisive rule, except when the parties clearly manifested its intent to contract based on its own terms, which is the present case (1).

**1. The “last-shot” rule determines that the Claimant’s standard terms prevail**

**126.** The logic underlying this doctrine is that the offeror has an implied duty to object the additional or conflicting terms. When the offeror does not object and consequently performs under the contract the result is that an implied consent to the terms of the acceptance occurred. In other words, the last person to send his form is considered to control the terms of the contract and therefore the person who “*wins the battle*” [Shock-cushioning seat case; Doors case; Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation Ltd.; Magellan International Corp. v Salzgitter Handel GmbH; Roser Technologies, Inc. v. Carl Schreiber GmbH, Cashmere Sweaters case].

**127.** As stated above, according to the UNIDROIT Principles’ official commentary, «*the “last-shot” doctrine may be appropriate if the parties clearly indicate that the adoption of their standard terms is an essential condition for the conclusion of the contract*» [defending the same position, Hondius/Mahé; Gumbis]. The fact that the present dispute is focused precisely on the applicability of one Code rather than the other, clearly shows the importance

given by the parties to this issue. Therefore, the “*last shooter*” will prevail, which in the present case was Claimant when it submitted its offer.

**2. Should this Tribunal apply the “*knock-out rule*”, the standards that are common in substance are the Global Compact Principles**

**128.** However, even if this Tribunal considers the application of the “*knock-out rule*” to be more adequate to the present case, the result would still be the same.

**129.** According to this rule, if the parties have agreed upon the essential terms of the contract, the mere disagreement regarding the applicable standard terms should not be an obstacle as to its conclusion. Rather, the conflicting terms are considered to have annulled each other which leads to the application of the Global Compact Principles, since they represent the common values the parties shared and that they intended to portray in their contract [*Ruhl*].

**130.** In a situation where both sets of terms are not taken into account, the shared principles and values of the parties are now the standards common in substance. Since both Claimant and Respondent are members of the UN Global Compact [*NofA*, p.4 §1; *Response to NofA*, p.25 §5], the world’s largest corporate sustainability initiative [<https://www.unglobalcompact.org/>], these shall be the governing standards. Because this initiative is merely informative and not binding, members are only required to apply their “*best efforts*” in order to comply with the GC principles.

**131.** For this reason, the “*knock-out*” rule leads to the conclusion that Claimant was only obliged to apply its “*best efforts*”.

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**CONCLUSION OF THE THIRD PART**

**132.** In light of the above stated, it is clear that it is Claimant’s standard conditions that govern the contract entered into by the parties, since these were accepted by Respondent. In the unlikely event that this Tribunal would find Respondent’s reply to be inconclusive regarding the incorporation of the terms, then the Global Compact Principles, which are common to the parties, would be applicable.

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**PART 4: IN CASE RESPONDENT’S GENERAL CONDITIONS ARE APPLICABLE CLAIMANT STILL FULLY COMPLIED WITH ITS CONTRACTUAL OBLIGATIONS**

**133.** Even under the hypothesis that Respondent’s GCC are applicable, Claimant has still fully complied with its obligations. Firstly, these GCC allow the designation of Claimant’s Code as the governing standards, which only require it to use its “*best efforts*” to ensure compliance (I). Secondly, the conformity of the goods is established on the basis of the



parties' intent, usages and subsequent behaviour, which utterly means that the use of "*best efforts*", as contractually agreed, was enough for the cakes to be conforming (II).

**I. THE PROCUREMENT OBLIGATIONS INSERTED IN THE CONTRACT ONLY REQUIRE CLAIMANT TO USE ITS "BEST EFFORTS" TO ENSURE COMPLIANCE BY ITS SUPPLIERS**

**134.** Respondent's GCC determine the application of its CC [*Cl. Exb. C2, p.12 §1*], which contains procurement obligations that consist in Claimant's discretion in choosing comparable standards (A) and in making sure that those suppliers adhere to them.

**135.** That being said, and considering that Respondent expressly acknowledged the comparability of both Codes, Claimant lawfully applied its own CC which only requires it to use its "*best efforts*" (B) to make its suppliers comply with the principles arising from the Code.

**A. RESPONDENT ACKNOWLEDGES THE SHARED VALUES AND COMMITMENT TO THE STANDARDS OF SUSTAINABILITY COMPRISED IN RESPONDENT AND CLAIMANT'S CODES. THUS, CLAIMANT LEGITIMATELY APPLIED ITS OWN**

**136.** More than once Respondent acknowledged the similarity and *shared values* between both Codes. Firstly, on the email sent on April 2014 [*Cl. Exb. 5, p.17 §2*], and secondly on the response to notice of arbitration when it stated that both Codes were largely comparable. [*Response to NofA, p.27 §27*].

**137.** In fact, Respondent's recognition is not surprising, since both Respondent's and Claimant's CC for suppliers approach the same concerns. They both establish that their suppliers must respect human rights, fair labor conditions, and produce in a ethical and sustainable manner [*Cl. Exb. C2, p.13; Resp. Exb. R3, p.31*].

**138.** Thus, it is easy to perceive that Claimant and Respondent conduct their activities in accordance with almost identical standards, consequently, without any doubt, Claimant's CCS shall be considered a Code with "*comparable*" standards to those set out in Respondent's Code [*Cl. Exb. C2, p.14, section E*].

**B. CLAIMANT'S CODE OF CONDUCT DETERMINES A MEANS OBLIGATION**

**139.** Claimant's CC has a clear commitment to behaving responsibly, ethically and sustainably. To accomplish this objective, Claimant expects to positively influence its suppliers to follow the same values of sustainability expressed in its Code [*Resp. Exb. R3, p.31 §2*]. Section 4 of Claimant's CC reflects its serious intention to shape its suppliers towards a responsible attitude concerning the environment and in Section 5, Claimant reserves the right to perform audits to its suppliers and request certificates proving that compliance.

**140.** That being said, no more can be required from Claimant than to use its “*best efforts*” in order to ensure that its suppliers complied with its Code. However, no duty to achieve a result can be inferred from Claimant’s Code.

**II. UNDER ART.35 OF THE CISG THE CAKES DELIVERED ARE CONFORMING TO THE CONTRACT.**

**141.** Art.35 sets out the CISG’s necessary product requirements in order to be classified as conforming to the contract. The cakes delivered met all those standards and, for that reason, were conforming to the contract.

**A. PURSUANT TO ART.35, THE CONFORMITY OF THE GOODS DEPENDS ON THE QUANTITY, QUALITY AND DESCRIPTION REQUIRED BY THE CONTRACT ITSELF**

**142.** The heart of the seller’s contract obligation is to deliver the right goods [*Maley; Henschel, Saidov*]. This duty is clarified on Art.35 CISG which embodies the principle of conformity and is supported by the general principle of parties’ autonomy expressed in Art.6 CISG, stating that “*the seller must deliver goods which are of the quantity, quality and description required by the contract*”. Because no issue has arisen relating to the quantity and the description of the chocolate cakes, the alleged lack of conformity is related to the quality of these goods.

**B. ART.35 CISG CAN BE INTERPRETED BY THREE METHODS**

**143.** Concerning the interpretation of the contract, the CISG comprises guidelines which should be taken into account. First, importance is given to the intent of the parties and writing of the contract **(1)** [*Art.35(1), 8(1)*]. However the usages **(2)** [*Art.8(3), 9*] and subsequent conduct of the parties **(3)** [*Art.8(3)*] should also be duly regarded. Consequently, the conformity of the chocolate under Art.35 shall be interpreted in accordance to those three methods.

**1. According to the contract and intention of the parties the goods are conforming to the contract**

**144.** From the moment parties met at the Danubia Food Fair and throughout all the negotiation process, both Claimant and Respondent made clear their intention to include extrinsic factors to the conformity of the cakes, which concerned a sustainable production. Thus, Claimant does not contest that the principles of sustainability should be duly considered for the assessment of conformity under Art.35 CISG [*UNCITRAL Secretariat Commentary; Honnold*].

**145.** The quality of the goods is determined by the contract established between the parties and its inherent principles and values [*Poikela*] **(a)**, which in the present case consist mainly

in the parties common commitment to the UN Global Compact and its respective incorporation into their Codes of Conduct (b). Because the parties intended these sustainability principles to be determinant in the production process, those should be part of the conformity assessment under Art.35 CISG.

**146.** However, this assessment must respect the nature of Claimant's contractual obligation. Meaning: Claimant had to deliver the goods which are of the quantity, description required by the contract and, as to the quality of the goods, Claimant was obliged to use its "*best efforts*" in order to deliver goods that were conforming with the sustainability principle (c) which it did.

**147.** Taking all these facts into consideration, Claimant fulfilled its obligations, and for that reason, according to the letter of the contract and intention of the parties, the cakes delivered are conforming to the contract.

**a. The quality of the goods is determined by the contract and its inherent principles and values**

**148.** Indeed it can be made an argument, that the buyer can expect more than what can be embodied in the goods [*Maley; Ferrari, Organic Barley case, Soy protein products case*]. This is Respondent's situation, since it expected not only that the cakes would have the agreed physical characteristics but also that Claimant would do all in its power to make sure that the cakes were produced in a sustainable way.

**149.** The CISG secretariat, in its commentary, recognized that in order to find the standard for conformity, one needs to assess the contract between the parties. Professors Fritz Enderlein and Dietrich Maskow, among with other authors, go along with the same line of reasoning, stating that Art.35 CISG specific requirements should be deduced from the purpose and circumstances of the contract.

**150.** In view of the above, the principles and values expressed on the contract should be taken into consideration and constitute a contractual description for the purpose of the Art.35 CISG [*Henschel; Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld*].

**b. Both parties have expressed their commitment to the Global Compact principles and values as well as to fair trade and sustainability**

**151.** Since Claimant and Respondent first met, they always agreed on the importance of an ethical and environmentally sustainable production, as both were members of the Global Compact (non-legally binding) initiative. On an email sent to Claimant, on March 2014, Respondent emphasized that the quality of the goods in combination with its membership to Global Compact made Claimant a very attractive supplier [*Cl. Exb. C1 p.8 §3*].

**152.** This affiliation to the principles of Global Compact was so important that was one of the two decisive reasons for choosing Claimant as a suppliers [PO2, p.52 §23]. Moreover, both parties had included in their business negotiation very similar Codes of Conduct that enforce this respectful attitude towards the environment. Therefore, both parties are committed to the principles set forth in Global Compact and in both parties' Codes of Conduct.

**c. Those principles and values are to be pursued according to Claimant's Code of Conduct, which requires Claimant only to use its "*best efforts*" to comply with such values**

**153.** The understanding of Claimant's CC is that it should positively persuade its suppliers to act in accordance with its Code, expecting them to comply with a sustainable production [Resp. Exb. C3, p.30]. Claimant's aim is to mobilize its suppliers towards a more responsible business practice, by aligning their strategies with the Ten Principles on human rights, labour, environment and anti-corruption.

**154.** Thus, a means obligations can be deduced from Claimant's Code.

**d. Claimant did all in its power to comply with its obligations**

**155.** The duty of "*best efforts*" is defined on Art.5.1.4 of the UNIDROIT as being the nature of an obligation that binds the party to "*make such efforts as it would be made by a reasonable person of the same kind in the same circumstances*". This obligation of means was not taken lightly, as it can be sustained by Claimant's behavior throughout performance, reaching beyond the attitude of a reasonable person of the same kind in the same circumstances.

**156.** The measures taken to pursue such compliance varied from hiring a specialized company to audit their suppliers in Ruritania [which until the scandal was known as a reliable company] to asking for further reports and documentation regularly. Moreover, Claimant is known in the market for being a company that strictly monitors its supply chain and that is the reason why for the past five years "*there have been no reported cases about a violation of the UN Global Compact Principle by Claimant or any of its suppliers*" [PO2, p.54 §34].

**157.** Even after Respondent stopped complying with its obligations after discovering the scandal, Claimant continued to act accordingly to the "*best efforts*" behaviour. On one hand, Claimant immediately terminated the contract it had with Ruritania Peoples Cocoa and on the other, through its "*best efforts*", Claimant was able to secure, in a short period of time, other suppliers in order to continue delivering [Cl. Exb. C9, p.21 §3].

**e. The interpretation of the duty of “best efforts”**

**158.** According to Clause 19 of Respondent’s GCC, the UNIDROIT Principles are applicable subsidiarily. Such Principles provide the definition of “best efforts” on Art.5.1.4 [*Cl. Ex. C2, p.12*] (**aa**).

**159.** Art.5.1.5 also establishes three criteria that assist on the interpretation of the means obligation (**bb**). These criteria are: the way in which the obligation is expressed in the contract, the degree of risk normally involved in achieving an expected result and the ability of the other party to influence the performance of the obligations.

**aa. Art. 5.1.4 defines “best efforts”**

**160.** According to the UNIDROIT’s official commentary of Art.5.1.4, a party that has a “best efforts” obligation must exert the efforts that a reasonable person of the same kind would exert in the same circumstances. However, this obligation does not guarantee the achievement of a specific result [*Award by the Arbitration Court of the Lausanne Chamber of Commerce and Industry*].

**161.** Respondent, being a sophisticated party, member of Global Compact and aspiring to be a Global Compact Lead company [*Cl. Ex. C1, p.8 §4*], can be considered a reasonable person of the same kind and, as it has also contracted not only with the expectation of a specific product but also with its inherent principles and values, Respondent can also be considered a person in the same circumstances. Therefore, Respondent, that also had the right to audit and inspect its supplier chain, that could at least have requested all the relevant documentation [*Cl. Exb. C2, p.14, section F*], that had in fact the obligation to examine the goods delivered under Art.35 CISG [*Fiser-Sobot*], was not capable, as Claimant was also not, of predicting Ruritania Peoples Cocoa fraudulent actions [*Cl. Exb. C2*].

**162.** Existing case law has evidenced a lighter definition of “best efforts” [*Adams*], by not requiring that a party should make every considerable effort to accomplish a goal. The appropriate standard is either good faith or reasonableness, as in the *Bloor v. Falstaff Brewing Corp.* case stating that a “best efforts clause imposes an obligation to act with good faith in light of one’s own capabilities” and *W. Geophysical Co. of Am. v. Bolt Assocs., Inc.* case sustaining that an obligation of “best efforts” can be secured by “an active exploitation in good faith”. Regarding reasonableness, the *Davidson & Jones Development Company v. Elmore Development Co., Inc.* case establishes a connection between “best efforts” with good faith and suggests that these duties require the party to make a reasonable effort and exercise a reasonable diligence.

**163.** Claimant fully respected both standards, having taken major steps to comply with the sustainable standards.

**bb. Art.5.1.5 provides criteria of interpretation to identify the nature of the obligation**

**164.** Art.5.1.5 offers guidance in order to determine whether the obligation involves a duty to achieve a specific result or simply a duty of “*best efforts*”.

**bbi. Art.5.1.5(a) - Nature of the obligation as expressed by the contract**

**165.** The way in which the procurement obligations are expressed in the contract reveals that the parties wanted to create a duty of “*best efforts*”. The terms “*ensure*” on Section C of Respondent’s CC, as well as the terms “*positively influence*” and “*expect*” from Claimant’s CC for suppliers, indicate a means obligation and not a results obligation. These terms stated above mean that Claimant would safeguard and certificate, that its suppliers would sign a CC that would be comparable to Respondent’s Code, which it did.

**bbii. Art.5.1.5(c) - The degree of risk in performance of an obligation**

**166.** When a party’s obligation is linked to a high degree of risk, normally it is not expected from the party that it guarantees a result, neither is the other party entitled to the expectation of that result [*UNIDROIT Official Commentary*]. Predicting a scheme involving members of the government, ministers and top business leaders, having to scrutinize all this unguessable fraudulent actions, is certainly specially difficult, and for that reason, Claimant would never have to be expected to foresee such scandal.

**bbiii. Art.5.1.5(d) - The ability of the other party to influence the performance of the obligations**

**167.** If we focus on the influence criteria, it is readily perceptible for a reasonable person that Claimant would never be able to influence all the agents involved in the corruption scheme in order to guarantee a result of compliance with the sustainable principles and ethics standards. If that would be the case, Claimant would have to influence not only its suppliers but also government officials, ministers, members of the ministers. Such is not reasonable nor could never have been determined in the contract, not explicitly and not implicitly. As such, this criteria also indicates that the obligation inserted in the contract signed by the parties is an obligation of “*best efforts*”.

**cc) Claimant hired Egimus AG for a thorough audit and ensured that further audits would occur [*Cl. Exb. C8, p. 20*], even though Ruritania had a reliable reputation**

**168.** Claimant hired Egimus AG, a company specialised in providing expert opinion on Global Compact compliance. Besides an initial positive feedback, Claimant dedicated to act

in the best way possible, decided to contract a third-party to carry out audits and detail reporting for a five year cycle [*PO2*, p. 53 §32]. Throughout the past three years, Ruritania Peoples Cocoa has also been filling out questionnaires later sent to Claimant.

**169.** On the other hand, until the scandal, Ruritania had never been associated to bribery or fraudulent schemes and the way that the fraudulent scheme was executed fell outside Egimus AG expertise, thus making impossible to Claimant to suspect what was happening. The main point is that all the circumstances surrounding this case evidence a refined fraudulent scheme, which could not be unveil even through a strict investigation following the guidelines of the GC itself, and at any time provided reasons for Claimant to suspect what was truly happening.

## **2. According to the usages, the goods are conforming to the contract**

**170.** Under Art.9 CISG, the parties are bound to any usage to which they have agreed. It is an irrefutable fact that the adherence to the Global Compact Principles is a usage common to both parties (a). Even if one applies the Global Compact Principles to verify the chocolate cakes' conformity under Art.35 CISG, there would still be no lack of conformity as the Global Compact is a non-binding initiative that provides no sanction when a members fails to achieve compliance with the principles embraced by it (b). Indeed, Global Compact and Claimant's Code have very similar provisions concerning compliance by its subscribers.

### **a. The adherence to the Global Compact Principles is a usage**

**171.** In addition to the fact that both parties are members of the Global Compact, Respondent's Philosophy consists on a list of general principles which are almost identical to the UN Global Compact Principles [*PO2*, p.53 §31].

**172.** Throughout the whole contracting process, Respondent and Claimant mentioned several times the important role that Global Compact Principles had for both parties. Global Compact Principles are taken into account in every contract they sign and, according to Schwenger, by being members of Global Compact, those principles become part of their contracts as an international usage.

**173.** Therefore, the Global Compact Principles are a practice and it can be properly presumed that the parties acted with reference to them in their transactions [*Schwenger/ Leisinger*].

### **b. The Global Compact is a non-binding initiative that provides no sanction if its members fail to comply with its standards**

**174.** Global Compact presents itself not as a "watch dog" but as a "guide dog", as it does not police or enforce the behavior of companies, being a purely voluntary initiative that imposes no sanctions in case its members fail to comply with the standards. As Claimant's CC, GC's mission is to positively influence and not to obligate to a certain conduct.

**175.** In conclusion, if one would interpret the contract taking into consideration the usage between the contractors, the cakes delivered were conforming to the contract because Global Compact Principles do not oblige its signatories to achieve a result but to show a serious effort to do so.

**3. According to the subsequent conduct of the parties the goods are conforming to the contract**

**176.** Respondent's subsequent conduct also demonstrates the conformity of the cakes. Despite claiming that the cakes delivered were not conforming to the contract, Respondent used the same cakes to promote its image on a special marketing campaign for the opening of three new shops. This conduct evidences that the cakes were perfectly conforming to a point that they could be used to represent Respondent's business campaign (all the products are part of a healthy, natural word), as the chocolate cakes were one of the two products chosen, among all the others products that are sold in Respondent's supermarket chain, in order to promote Respondent's brand [*Response to NofA*, p.25 §6].

**a. UNIDROIT Principles Art.1.8 condemns Respondent's conduct during the special marketing campaign for the opening of three new shops**

**177.** Pursuant to Art.1.8 UNIDROIT, a party cannot act inconsistently with an understanding it has caused the other party to have [*Società X v. INPS; Joseph Charles Lemire & others v. Ukraine; "Novograd Isteit" close corporation and others vs "Electroagregat" joint stock company and others*].

**178.** Upon an alleged lack of conformity of the cakes under Art.35 CISG, Respondent declined to fulfill its obligation to pay the price (Art.54 CISG) since it could raise a considerable reputation damage. Respondent argued that it had to delist the cakes without drawing too much public attention, because they were against "*every value Respondent stands for*" [*Response to NofA*, p.24 §2 and 3]. Surprisingly, the same reputation that was once in danger because of the chocolate cakes, was then promoted a short time later through the use of all the allegedly non-conforming cakes. In addition, the event chosen to promote Respondent's brand was in fact a public occasion, with public attention, a special marketing campaign for the opening of three new shops [*PO2*, p. 54 §38].

**179.** What was described above, not only evidences Respondent's inconsistent behavior, but also its breach of good faith and fair dealing [*UNIDROIT Official Commentary, Art.1.8*]. Acting contrarily to good faith [*the basic columns of all juridical reasoning (Fallä)*], is acting with malicious behavior, occurring when a party exercises a right for a purpose other than the one for which it had been granted [*UNIDROIT*]. Respondent, in this case, used the right of the



buyer to avoid the contract, Art.49 CISG, sustained by the alleged lack of conformity of the cakes , but in the end, its own conduct evidenced that the cakes were in fact conform and have no defect according to Art.35 CISG.

**180.** In conclusion, Respondent's inconsistent behavior shows that the cakes were indeed conforming to the contract signed by the parties and under Art.35 CISG. It also evidences that, contrarily to Claimant's attitude, Respondent acted in bad faith by abusing its rights of avoiding the contract and causing damages to Claimant.

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### CONCLUSION OF THE FOURTH PART

**181.** Even if Respondent's General Conditions are applicable Claimant still complied with all of its obligations, since it legitimately applied its own CC which merely compelled it to use its "*best efforts*" to comply with the sustainability principles. Furthermore, the cakes delivered are conforming to the contract since they were of the quantity, quality and description required by the contract taking into account the parties intention, trade usages, and even its subsequent conduct. For all that has been stated in this Memorandum, Claimant is entitled to the payment of the outstanding amount of USD 1,200,000 for the cakes delivered and not yet paid.

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### REQUEST FOR RELIEF

In light of the above, Claimant respectfully requests the Arbitral Tribunal to declare that:

1. Mr. Prasad's challenge must be decided by an appointing authority or, alternatively, by the Arbitral Tribunal with the participation of Mr. Prasad;
2. Mr. Prasad shall not be removed from the Arbitral Tribunal;
3. Claimant's General Conditions of Sale shall be deemed as applicable to the contract;
4. Claimant fulfilled its contract obligations and therefore is entitled to the payment of the outstanding price in the amount of USD 1,200,000 for the cakes delivered and not yet paid;
5. Claimant is entitled to damages in the amount of at least USD 2,500,000 for the damages incurred as consequence of Respondent's breach of the contract;
6. Respondent shall bear all the costs of this arbitration;

Claimant reserves the right to amend its request for relief as may be required

**CERTIFICATE**

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Lisbon, 7 December 2017,

Bruna Corby

Bruna Corby Nunes

Jamilly Gomes

Jamilly Gomes

Jenny Medina

Jenny Medina

Madalena Palha

Madalena Palha

Sara Margarida Freitas

Sara Margarida Freitas

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TWENTY- FIFTH ANNUAL  
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

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**NOVA FACULTY OF LAW UNIVERSITY OF LISBON**



**MEMORANDUM FOR RESPONDENT**

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**On Behalf Of:**

Comestibles Finos Ltd  
75 Martha Stewart Drive  
Capital City  
Mediterraneo

**RESPONDENT**

**Against:**

Delicately Whole Foods Sp  
39 Marie-Antoine Carême Avenue  
Oceanside  
Equatoriana

**CLAIMANT**

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*Counsel for* **RESPONDENT**

Bruna Corby • Jamilly Gomes • Jenny Medina • Madalena Palha • Sara Margarida Freitas

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<b>§</b>	Paragraph
<b>Art.</b>	Article
<b>Arts.</b>	Articles
<b>CC</b>	Code of Conduct/ Codes of Conduct
<b>CCS</b>	Code of Conduct for Suppliers
<b>CISG</b>	United Nations Convention on Contracts for the International Sale of Goods
<b>Cl.</b>	Claimant
<b>Exb</b>	Exhibit
<b>GCC</b>	General Conditions of Contract
<b>GCS</b>	General Conditions of Sale
<b>GC</b>	Global Compact
<b>IBA</b>	International Bar Association
<b>ISO</b>	International Organization for Standardization
<b>LofA</b>	Letter of Acknowledgment
<b>LP</b>	Limited Partnership
<b>Ltd</b>	Limited
<b>MfC</b>	Memorandum for Claimant
<b>Mr.</b>	Mister
<b>Ms.</b>	Miss
<b>NofA</b>	Notice of Arbitration
<b>NofC</b>	Notice of Challenge



<b>Ord.</b>	Order
<b>PCA</b>	Permanent Court of Arbitration
<b>p.</b>	Page
<b>pp.</b>	Pages
<b>PO1</b>	Procedural Order n.1
<b>PO2</b>	Procedural Order n.2
<b>Proc.</b>	Procedural
<b>Resp.</b>	Respondent
<b>Req. Arb.</b>	Request for Arbitration
<b>UN</b>	United Nations
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNIDROIT</b>	International Institute for the Unification of Private Law
<b>USD</b>	United State Dollars
<b>v.</b>	Versus

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## STATEMENT OF FACTS

### **The Parties**

1. Delicatesy Whole Foods Sp ("Claimant") is a medium sized manufacturer of bakery products registered in Equatoriana and Comestibles Finos Ltd ("Respondent") is a gourmet supermarket chain in Mediterraneo.

### **The Agreement**

2. On March 2014, Claimant and Respondent met at the Danubian Food Fair, during which Mr. Tsai, Claimant's Head of Production, and Ms. Ming, Respondent Head of Purchase, discussed a possible supply contract. Consequently, on 10 March 2014, Respondent sent an invitation letter to tender, which contained its General Conditions of Contract, Code of Conduct and General Business Philosophy. In order to express its intent to submit an offer in accordance to the Tender Documents, on 17 March 2014, Claimant signed and sent a Letter of Acknowledgment to Respondent.

3. On 27 March 2014, Claimant sent its offer to Respondent expressly proposing two changes to the Tender Documents (that the cakes would have a different shape and that the payment period with be shorter). This offer contained a footnote mentioning its General Conditions of Sale and its Codes of Conduct. Respondent accepted this proposal (on 7 April 2014) with the two modifications, and mentioned Claimant's Codes, appreciating the shared values of sustainability, fair trade and human rights.

### **The breach of the agreement by Claimant**

4. Later on (19 January 2017), Respondent came across a report of a UNEP Special Rapporteur, through Equatoriana State News Channel, investigating the growing deforestation in Ruritania. In this report, it was warned that the local cocoa farmers in Ruritania had been violating the principles of sustainable farming by perpetrating the crimes of fraud and corruption. They helped to burn large parts of rainforest, causing 100,300 premature deaths in Ruritania, while bribing members of the government to issue permits within those nature reserves. Evidence shows that just the recent fires burnt more than two million hectares and affected 44 million people

5. After hearing from Ruritania Peoples Cocoa mbH, Claimant regrettably confirmed with Respondent that its supplier was, in fact, one of the companies involved in the corruption scandal.



6. Claimant stated to be surprised by Ruritania's breach, since it had previously received certificates and documentation asserting the compliance with sustainability standards. However, this was due to the fact that Claimant hired Egimus AG, a company specialized in providing expert opinion on Global Compact compliance but whose scope did not include analyzing the State Certificate System used by Ruritania. After this event, Respondent had no other option than to announced the avoidance of the contract.

### **The arbitral proceedings**

7. On 30 June 2017, Claimant filed the Notice of Arbitration seeking the payment of the cakes not yet paid plus damages. Attached to the Notice of Arbitration was the declaration of impartiality and independence of the Claimant's appointed-arbitrator, Rodrigo Prasad, where he disclosed that he had been previously appointed two times as an arbitrator by Claimant's lawyer's law firm, Fasttrack & Partners.

8. Respondent submitted its response to the Notice of Arbitration on 31 July 2017. In the following month, on 27 August 2017, during a virus check of the electronic versions of the Notice of Arbitration, Respondent had access to information that indicated that Claimant was being financed by a third-party funder in the present arbitration.

9. The information retrieved was neither enough to understand the facts in question nor disclosed by Claimant or the arbitrator, thus Respondent requested the Arbitral Tribunal to order the Party to disclose the relevant information regarding the fund financing its claims. Claimant, complying with the arbitral tribunal's order, on 7 September 2017, disclosed that its claim was funded by Funding 12 Ltd and that its main shareholder was FindFunds LP.

10. Mr. Prasad, on the date of 11 September 2017, after the revelation of the funds identity and its major shareholder, submitted to the Parties and the Arbitral Tribunal a second disclosure informing about two cases he had acted as an arbitrator, which also had been funded by subsidiaries of Findfunds LP. Additionally, he disclose the recent merger of Prasad & Partners with Slowfood, a leading law firm in Ruritania, becoming Prasad & Slowfood. In this regard, one of his partners is currently representing a client in an arbitration, which is funded by one of Findfunds LP subsidiaries.

11. Three days after the acknowledgement of these facts, on 14 September 2017, Respondent filed a request for the challenge of Mr. Prasad to the Arbitral Tribunal.

## SUMMARY OF ARGUMENTS

### **PART 1: THE ARBITRATION AGREEMENT EXCLUDED THE APPLICATION OF THE CHALLENGE PROCEDURE PROVIDED BY ART.13(4) UNCITRAL RULES. CONSEQUENTLY, MR. PRASAD'S**

**CHALLENGE MUST BE DECIDED BY THE TWO OTHER MEMBERS OF THE ARBITRAL TRIBUNAL**

**12.** Claimant and Respondent settled for *ad hoc* arbitration in the Arbitration Agreement, having explicitly excluded the involvement of any arbitral institution. Since neither the non-challenging party nor the Mr. Prasad have agreed on the challenge, according with Art.13(4) UNCITRAL Rules the challenge must be decided by an Appointing Authority. Nevertheless, Respondent disagrees with the nomination of an Appointing Authority. Pursuant to Art.6(2) UNCITRAL Rules, compliance with Art.13(4) UNCITRAL Rules implies the assistance of the Secretary-General of PCA, an institutional aid. In this sense, the challenge procedure provided in Art.13(4) UNCITRAL Rules is excluded by the Arbitration Agreement. Consequently, Mr. Prasad's challenge must be decided by the two other members of the Arbitral Tribunal.

### **PART 2: MR. PRASAD SHOULD BE REMOVED FROM THE ARBITRAL TRIBUNAL, SINCE THERE ARE SERIOUS AND JUSTIFIABLE DOUBTS AS TO HIS IMPARTIALITY AND INDEPENDENCE**

**13.** The Arbitral Tribunal shall take into account the IBA Guidelines to decide Mr. Prasad's challenge. Furthermore, Mr. Prasad's challenge shall prevail since the facts of this case indicate that Mr. Prasad's behaviour constitutes justifiable doubts to his independence and impartiality. The circumstances around the previous connections between Mr. Prasad and Findfunds LP, also Mr. Prasad's repeated appointments by Fasttrack & Partners and the current arbitration case in which Mr. Prasad's partner is participating, cumulatively are sufficient to justify Mr. Prasad's challenge. Finally, contrary to Claimant's submission, Mr. Prasad article demonstrates his view on the merits of this arbitration, which prevents Mr. Prasad to approach the issue in dispute impartially.

### **PART 3: RESPONDENT'S STANDARD CONDITIONS SHALL GOVERN THE CONTRACT**

**14.** The negotiations between the parties were characterized by an invitation to make an offer from Respondent which established the contractual framework that would govern a future contract and by an offer from Claimant. In such offer Claimant expressly proposed two modifications to the Tender Documents, regarding the form of the cake and the payment conditions. An attempt to incorporate its own conditions of sale was also made in Claimant's

offer. However, Claimant's allegation that its terms were incorporated must be found groundless, since they were not validly included. The Tribunal will conclude that, in Respondent's acceptance it solely embraced the two express modifications, and that, for this reason, the contract is governed by Respondent's standard terms (GCC and CC).

**PART 4: BY DELIVERING NON-CONFORMING GOODS, CLAIMANT FAILED TO COMPLY WITH ITS OBLIGATION TOWARDS THE CONTRACT THAT REQUIRED A DUTY OF RESULT**

**15.** From the beginning of the negotiations to the conclusion of the contract, between Claimant and Respondent, it was notorious the importance of producing the chocolate cakes in accordance with the ethical and environmental principles contained not only on the Global Compact Principles, subscribed by both parties, but also in the Tender Documents signed by them as well. Because the production methods were included in the contract and essential to the parties, they formed part of the conformity assessment under Art.35 CISG. By delivering cakes which production methods were in violation of the sustainability and anti-corruption principles, Claimant incurred in a fundamental breach of the contract, giving Respondent the right to legitimately avoid the contract.

## ARGUMENTS

### **PART 1: THE ARBITRATION AGREEMENT EXCLUDED THE APPLICATION OF THE CHALLENGE PROCEDURE PROVIDED BY ART.13(4) UNCITRAL RULES. CONSEQUENTLY, MR. PRASAD'S**

### **CHALLENGE MUST BE DECIDED BY THE TWO OTHER MEMBERS OF THE ARBITRAL TRIBUNAL**

**16.** On 14 September 2017, following Claimant's nominated arbitrator disclosure of 11 September 2017, Respondent requested the Arbitral Tribunal to initiate the challenge procedure provided by Art.13(1) UNCITRAL Rules against Rodrigo Prasad.

**17.** Since the Arbitration Agreement expressly provides that any dispute resulting from Claimant and Respondent's contract shall be settled through *ad hoc* arbitration, without the involvement of any arbitral institution, the application of Art.13(4) UNCITRAL Rules challenge procedure was excluded by the Parties (**I**). Hence, pursuant to the *ad hoc* nature of the proceedings, the challenge must be decided by the Arbitral Tribunal, with the exclusion of Mr. Prasad (**II**).

### **I. The Arbitration Agreement excludes the application of Art.13(4) UNCITRAL Rules challenge procedure**

**18.** The Arbitral Tribunal must not rule in favour of the challenge procedure provided in Art.13(4) UNCITRAL Rules. Contrarily to Claimant's allegation, Respondent does not agree upon the nomination of an Appointing Authority [*MfC*, p.35 §19]. In order to trigger the said procedure, Claimant may rely upon the assistance of the Secretary-General of the Permanent Court of Arbitration [*Art.6(2) UNCITRAL Rules*]. Even so, such represents an assistance by an arbitral institution.

**19.** This solution is inconsistent with the *ad hoc* arbitration agreed by Claimant and Respondent in the Arbitration Agreement. The agreement not only establishes the *ad hoc* nature of the arbitration but also explicitly excludes the involvement of any arbitral institution for all intents and purposes [*Cl. Exb. C2*, p.12, *Clause 20*].

**20.** In light of this, the Arbitral Tribunal must conclude that the challenge procedure provided in Art.13(4) UNCITRAL Rules is not applicable to Mr. Prasad's challenge. Moreover, Respondent complied with the 15 days time limit to initiate a challenge procedure (**A**). Additionally, the challenge procedure provided by Art.13(4) UNCITRAL Rules is inconsistent with the Arbitration Agreement (**B**); and the appointment of an Appointing Authority is contrary to the confidentiality settled by Claimant and Respondent (**C**).

Therefore, Mr. Prasad's challenge shall be decided by the Arbitral Tribunal constituted by its remaining two members.

**A. Respondent complied with the 15 days time limit to initiate the challenge procedure**

**21.** Claimant's allegation that Respondent's right to challenge an arbitrator has expired, is unfounded [*MfC*, p.33 §8]. Pursuant to Art.13(1) UNCITRAL Rules, the party intending to challenge an arbitrator has 15 days to pursue this right, counting from an arbitrator's appointment or learning of the circumstances prompting the challenge [*Born*, p.1915]. As so, Claimant's defence that the relevant date is 27 August 2017 – the date in which Respondent acknowledged Mr. Fasttrack's note attached to §14 of the *Nofa* – simply cannot stand [*PO2*, p.51 §11; *NofC*, p.38 §3].

**22.** On 27 August 2017, Respondent obtained information which appeared to indicate that Claimant was being financed by a third-party funder. However, such information was neither enough to understand the facts in question nor disclosed by Claimant or the arbitrator. In light of this, Respondent diligently requested the Arbitral Tribunal to order Claimant to disclose the relevant facts [*Langweiler's Letter*, p.33], i.e., in order to investigate for possible conflicts affecting the arbitrator [*Born*, p.1943].

**23.** Claimant only revealed the identity of the fund financing its claims and its major shareholder on 7 September 2017. Consequently, on 11 September 2017, Mr. Prasad disclosed two previous cases funded by subsidiaries of Findfunds LP where he acted as an arbitrator and, that a partner of his law firm is currently acting for a party in an arbitration funded by a Findfunds LP subsidiary [*Prasad's Letter*, p.36; *NofC*, p.39 §12]. That being said, only from 11 September these circumstances became known to Respondent.

**24.** As explained above, Claimant's argument that Respondent's right to challenge the arbitrator is time barred, rests upon a wrong assumption of the relevant date. Once the facts were acknowledged, Respondent, within the time limit, promptly raised the challenge against Mr. Prasad [*Born*, p.1919]. In fact, since the *NofC* is dated 14 September 2017, Respondent pursued the challenge within a very short period after the facts giving rise to the challenge became known [*Lew/Mistelis*, p.308], i.e., only three days after Mr. Prasad's second disclosure [*Prasad's Letter*, p.36].

**25.** One can easily understand that Respondent not only complied with the obligation to investigate any possible objections to an arbitrator's independence, but also raised these promptly, without a moment's delay [*Suez v. Argentina I*; *CEMEX v. Venezuela*]. In

conclusion, the Arbitral Tribunal must acknowledge that Respondent complied with Art.13(1) UNCITRAL Rules, since the challenge was raised at the appropriate procedural moment, before any relevant decision was made.

**B. The challenge procedure provided by Art.13(4) UNCITRAL Rules is inconsistent with the Arbitration Agreement**

**26.** Due to a previous unfortunate experience with institutional arbitration, since the beginning of the negotiations, Respondent has made clear to Claimant the importance of maintaining entities, other than the Parties and the arbitrators out of the proceedings [*Resp. Exb. R5, p.41*]. After the negotiations, based upon an interest in preserving their reputation as international traders, Claimant and Respondent settled for *ad hoc* arbitration under UNCITRAL Rules, explicitly excluding the involvement of any arbitral institutional [*Cl. Exb. C2, p.12, Clause 20*].

**27.** The procedure provided in Art.13(4) UNCITRAL Rules establishes that, if neither the non-challenging party nor the arbitrator agree to the challenge, the procedure must be decided by an Appointing Authority [*Born, p.1915*]. Thus, in order for the challenge to be decided in accordance with Art.13(4) UNCITRAL Rules, parties would have to agree on the choice of an Appointing Authority [*Art.6(1) UNCITRAL Rules*]. Nevertheless, contrarily to Claimant's assumption, Respondent is not interested in such agreement.

**28.** Under these circumstances, pursuant to Art.6(2) UNCITRAL Arbitration Rules, the Secretary General of the Permanent Court of Arbitration in The Hague is mandated to be the default designator of an appointing authority [*Koch, p.338*]. This fall-back mechanism constitutes a dispute resolution service provided by the Permanent Court of Arbitration [*Daele, p.175; PCA website*], hence, the designation of the Appointing Authority by the Secretary-General would at all moments enact an institutional assistance.

**29.** Additionally, in the present case, considering that in order for the Appointing Authority to decide the challenge the Secretary-General would always have to intervene [*Reisman/Crawford, p.364*]. A decision favouring Claimant's position would constitute a ground to set aside the final award. As a matter of fact, any involvement of an arbitral institution in the present challenge proceedings, pursuant to Art.V(1)(d) New York Convention, would not be in accordance with the agreement of the parties [*Cl. Exb. C2, p.12, Clause 20*].

### **C. The appointment of an Appointing Authority is contrary to the confidentiality settled by Claimant and Respondent**

**30.** During the negotiations of the Arbitration Agreement, Respondent explained to Claimant that, due to its lack of confidence that a dispute would be kept confidential by any arbitral institution, it wanted as few persons as possible to know about the arbitration [*NofC*, p.39 §8]. Founded on these assumptions, the Arbitration Agreement provided for *ad hoc* arbitration without the involvement of any arbitral institution [*Resp. Exb. R5*, p.41; *Cl. Exb. C2*, p.12, *Clause 20*].

**31.** The choice-of-law clause underlying Claimant and Respondent's contract, selects CISG as the law governing the contract [*Cl. Exb. C2*, p.12, *Clause 19*]. Therefore, the Arbitration Agreement, along with the negotiations on confidentiality, shall be interpreted in accordance with the principles of good faith and fair dealing in international trade [*Art.7(1) CISG*; *Case No. 802*]. Hence, according to the substantive law governing the underlying contract to the Arbitration Agreement [*Born*, p.515], the Arbitral Tribunal must take into consideration that that all information regarding the contract is protected by confidentiality.

**32.** Nevertheless, even if Claimant alleges that any Appointing Authority would be acting under confidentiality duties, the “*involvement*” of any institution would represent a breach of the Arbitration Agreement. Furthermore, when deciding challenges, the Secretary-General, depending on the circumstances of the case, may subject the decision to a special committee, consisting of three persons [*PCA website*]. In both circumstances, the challenge procedure would not be in accordance with the agreement of the parties which constitutes, according to Art.V(1)(d) New York Convention, grounds for the final award to be set aside.

### **II. Given the *ad hoc* nature of the proceedings, the challenge must be decided by the Arbitral Tribunal, with the exclusion of Mr. Prasad**

**33.** The provision for *ad hoc* arbitration in the Arbitration Agreement, also explicitly rejecting the involvement of any arbitral institution, results in the exclusion of the application of Art.13(4) UNCITRAL Rules. Thus, given the as *ad hoc* nature of these proceedings, the challenge must be decided by the arbitral tribunal with the exclusion of Mr. Prasad.

**34.** As it will be explained below, under UNCITRAL Rules, Mr. Prasad cannot be part of the arbitral tribunal deciding his challenge (**A**). Consequently, pursuant to Art.13(2) Model Law, the challenge must be decided by the other two members of the arbitral tribunal (**B**).

**A. Under UNCITRAL Rules, Mr. Prasad cannot be part of the Arbitral Tribunal deciding his challenge**

**35.** According to Claimant and Respondent's Arbitration Agreement, any dispute resulting from the contract shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules [*Cl. Exb. C2, Clause 20, p.12*]. Whereas neither the non-challenging party nor the challenged arbitrator have reached an agreement on the challenge, the drafters of the UNCITRAL Rules considered the Appointing Authority as the neutral third-party, appropriate to be the tribunal to decide the challenge of an arbitrator [*Report of the Secretary-General, 9<sup>th</sup> session, p.171*].

**36.** UNCITRAL Arbitration Rules entrusts the Secretary-General of the PCA with maintaining the integrity of the international arbitral process, by authorizing the Secretary-General, upon the request of a party, to designate an “*appointing authority*” for the purpose of ruling on challenges to arbitrators [*Art.6 UNCITRAL Rules; Reisman/Crawford, p.365*]. Thus, the “*ratio*” under Art.13(4) UNCITRAL Rules demonstrates the drafters' intention to avoid the possibility of the challenged arbitrator deciding its own challenge.

**37.** In other words, Claimant's request falls flat, since even under Art.13(4) UNCITRAL Rules, which Claimant defends to be applicable to this case, the arbitral tribunal has no power to decide on the challenges of its own members [*Paulsson/Petrochilos, p.94*]. Furthermore, if institutional assistance had not been excluded from the Arbitration Agreement, Mr. Prasad would never be able to be part of the arbitral tribunal deciding the challenge against him because, in the absence of an agreement upon the challenge, it would be for an Appointing Authority to decide and never for the whole tribunal with Mr. Prasad's participation.

**B. Mr. Prasad's challenge must be decided by the other two members of the Arbitral Tribunal**

**38.** Given that Claimant and Respondent excluded the application of Art.13(4) UNCITRAL Rules, Mr. Prasad's challenge shall be decided in accordance with the law of the place of the arbitration, UNCITRAL Model Law [*Cl. Exb. C2, p.12, Clause 20(b)*]. Where the parties have not exercised their freedom or they have failed to cover a particular issue, the Model Law ensures that the arbitration may commence and proceed effectively until the dispute is resolved [*UNCITRAL Model Law Explanatory Note, p.30*].

**39.** The claim that Mr. Prasad's challenge shall be decided by the arbitral tribunal fully composed cannot stand. Pursuant to Art.13(2) Model Law, unless the challenged arbitrator



withdraws from his office or the other party agrees, the arbitral tribunal shall decide the challenge. Under the present facts, the provision allows Respondent to send a written statement of the reasons for the challenge to the arbitral tribunal [*Lew/Mistelis*, p.312].

**40.** A decision favouring Claimant's request, under the principles of natural justice and procedural fairness, is both unfair and illogical [*Suresh*]. Where one of a panel of arbitrators is challenged, it is best that he should not take part in the decision of the challenge [*Schumacher*, p.433]. In this sense, Respondent requests the challenge to be decided by its remaining other two members.

**41.** Moreover, complying with the principle of "*nemo debet esse iudex in propria causa*", arbitrators should not be their own judge in matters of challenge [*Berger*, p.503]. The principle arises in any situation where a judge or arbitrator has a pecuniary or non-pecuniary interest in the subject matter of the case over which he is presiding, or is so closely connected to one of the parties that he may be said to be acting in his own cause [*Foster/Barratt*, p.323].

**42.** As further explained, Mr. Prasad is closely connected with Findfunds LP, the fund financing Claimant's claim [*Fasttrack Letter*, p.35]. Thus, Mr. Prasad cannot be part of the arbitral tribunal deciding his own challenge.

**43.** Nonetheless, if the Arbitral Tribunal understands otherwise, Respondent subsidiarily requests for Mr. Prasad not to participate in the arbitral tribunal's vote on the challenge. In such event, the Arbitral Tribunal must determine that the challenge procedure falls within the notion of "questions of procedure" of Art.33(2) UNCITRAL Rules, which allows the arbitral tribunal to grant the presiding arbitrator the power to take the decision alone [*Paulsson/Petrochilos*, p.293]. In any other way the decision on Mr. Prasad's challenge will be biased.

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### CONCLUSION OF THE FIRST PART

**44.** Claimant and Respondent settled for *ad hoc* arbitration and explicitly excluded the involvement of any arbitral institution for all intents and purposes in the Arbitration Agreement. Compliance with the challenge procedure provided in Art.13(4) UNCITRAL Rules implies the assistance of the Secretary-General of PCA, an institutional aid. The application of Art.13(4) UNCITRAL Rules is excluded the Arbitration Agreement. Consequently, Mr. Prasad's challenge must be decided by the two other members of the arbitral tribunal.

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**PART 2: MR. PRASAD SHOULD BE REMOVED FROM THE ARBITRAL TRIBUNAL, SINCE THERE ARE SERIOUS AND JUSTIFIABLE DOUBTS AS TO HIS IMPARTIALITY AND INDEPENDENCE**

**45.** On September 14, 2017 Respondent submitted a *NofA* of Mr. Prasad. The Tribunal is requested to accept Mr. Prasad challenge, since he is not independent to act as an arbitrator in the present proceedings, and replace him by a different arbitrator. Contrarily to Claimant's claims, the Arbitral Tribunal shall take into account the IBA Guidelines to decide the challenge **(I)**. Moreover, the facts of this case indicate that Mr. Prasad's behaviour constitutes justifiable doubts to his independence and impartiality **(II)**.

**I. The Arbitral Tribunal shall decide the challenge taking into account the IBA Guidelines on Conflict of Interests**

**46.** Although the IBA Guidelines are *soft law*, nonetheless they represent an additional and important tool to clarify the grounds for challenge provided in Art.12(1) UNCITRAL Rules. Hence, Respondent requests the Arbitral Tribunal to take into account the standards of the IBA Guidelines to decide Mr. Prasad's challenge. Additionally, according to the IBA Guidelines a Party has to disclose that it is funded by a third party, however Claimant failed to comply with this duty **(A)**.

**A. According to the IBA Guidelines, Claimant has a duty to disclose the third-party funding**

**47.** Claimant asserts that the IBA Guidelines are not applicable to this case [*Fasttrack's Letter*, p. 45 §3]. Nevertheless, in his last submission, Claimant did not oppose to the application of the IBA Guidelines, quite the contrary, he recognized these rules [*MfC*, p.42 §55]. Hence, Claimant's contradictory behaviour shows that his position regarding the non-application of the IBA Guidelines was wrong.

**48.** Claimant and Respondent, in the Arbitration Agreement [*NofA*, Clause 20, p.6], established that the the UNCITRAL Rules are applicable to the dispute. Hence, the challenge of Mr. Prasad, as a procedural issue, must be decided in accordance with the Art.12(1) of the UNCITRAL Rules, which establishes the standard for the “*challenge of arbitrators*”. Furthermore, the UNCITRAL Rules, the IBA Guidelines are also an important and auxiliary tool in order to clarify the grounds for challenge, especially concerning the disclosure requirement. They promote common standards of independence and impartiality, regardless of legal culture and background [*Parsons*, p.8]. Therefore, Respondent recognizes that the

Art.12(1) UNCITRAL Rules is the applicable law, nevertheless the IBA Guidelines are an additional rules that can contribute to the interpretation of the Art.12(1) UNCITRAL Rules.

**49.** The IBA Guidelines are not legal provisions, neither contractually-binding [*Born, p.1840*]. Nevertheless, they are a precious instrument, capable of contributing to harmonization and unification of the standards applied in the field of international arbitration to dispose of conflict of interests and such an instrument should not fail to influence the practice of arbitral institutions and tribunals [*Swiss Federal Court, 4A\_506/20071*]. Therefore, it is crucial that the Arbitral Tribunal look at the IBA Guidelines when deciding the challenge.

**50.** According to the IBA Guidelines standard 7(A), a Party has to disclose that it is funded by a third party. However, Claimant not only failed to comply with this duty, but also, deliberately, concealed such fact [*NofC, p.38 §3*]. Therefore, Claimant's behaviour supports Respondent's doubts regarding the impartiality and independence of Mr. Prasad. Also, even if Claimant had complied with his duty to reveal the presence of Funding 12, Respondent would still be in doubt because Mr. Prasad has acted as an arbitrator in previous two claims funded by other subsidiaries of Findfunds LP.

## **II. Mr. Prasad's behaviour constitutes justifiable doubts to his independence and impartiality**

**51.** The Arbitral Tribunal shall accept Mr. Prasad's challenge as his behaviour puts in risk his independence and impartiality. First, the previous connections between Mr. Prasad and Findfunds LP jeopardize the arbitrator's independence and impartiality as per Art.12 UNCITRAL Rules (A). Second, Mr. Prasad's repeated appointments by Fasttrack & Partners are problematic, according to the IBA Guidelines (B). Finally, with the merger of Mr. Prasad law firm and Slowfood, the current arbitration case in which Mr. Prasad's partner is participating, which is funded by Findfunds LP subsidiary, constitutes grounds to disqualify an arbitrator (C). And, contrary to Claimant's submission, Mr. Prasad article in the Vindobona Journal of International Commercial Arbitration and Sales Law demonstrates his view on the merits of this arbitration, which also constitutes doubts as his independence and impartiality (D).

**A. The previous connections between Mr. Prasad and Findfunds LP jeopardize his independence and impartiality**

**52.** On 7 September 2017, Claimant disclosed that it has been funded by Funding 12 Ltd, which has as main shareholder Findfunds LP. Additionally, on 11 September, Mr. Prasad informed that he has acted as an arbitrator in two cases also funded by other subsidiaries of Findfunds LP [*Prasad's Letter*, p. 36 §1]. In this sense, there is a justified concern that an arbitrator who becomes reliant upon a single party for the majority of his appointments may find his independence compromised and may favour the appointing party's arguments so that he may secure the flow of future appointments [*Daele*, p.345].

**53.** The two previous arbitrations were within the five biggest arbitrations that Mr. Prasad acted as an arbitrator in the last three years, making up for 20% of his fees [*PO2*, p.51 §10]. Therefore, since Mr. Prasad derives between 30% - 40% of his earnings from his work as an arbitrator [*PO2*, p.51 §10], the arbitrations funded by Findfunds LP subsidiaries constituted a large percentage of his earnings in the last three years. Also, in these previous cases, the awards rendered were all in favour of the parties which had appointed Mr. Prasad [*PO2*, p. 51 §15].

**54.** Moreover, Mr. Fasttrack had knowledge of the previous connections between Mr. Prasad and Findfunds LP subsidiaries, nevertheless he decided to conceal this fact [*PO2*, p.51 §12]. In this sense, Mr. Fasttrack suggested to Claimant to not disclose this information to Respondent in order to avoid potential challenges of Mr. Prasad [*NofC*, p.38 §3]. In other words, Mr. Fasttrack recognized how serious these connections were and decided to circumvent any risk of bias by covering these connections.

**55.** According to the IBA Guidelines, the party has a duty to disclose that it is funded by a third party. This duty, is not only to the parties. Indeed, arbitrators have also the obligation to investigate or to take reasonable steps to being informed about their own potential conflicts of interests [*ICCA-QMUL Task Force Draft*, p.91; *HSMV. Corp. v. ADI Ltd*]. Besides, according to the IBA Guidelines, the arbitrator is also under a duty to make reasonable enquiries to identify any conflict of interest [*IBA Guidelines on Conflict of Interests, general standard 7(B)*, p.15], this is so because otherwise it would be impossible to ensure that all relevant facts are effectively disclosed. Thus, the arbitrator's failure to check relationships with third parties, such as third-party funders, may rise to a conflict that cannot be avoid by just closing the eyes or not requesting a conflict check [*Goeler; J & P Avax v. Tecnimont*].

**56.** The Claimant asserts that Mr. Prasad had no knowledge of the presence of a third party funder, therefore a direct and verifiable lack of knowledge of third party funders by itself vitiates a possible ground of challenge. Nevertheless, Claimant knows that such argument, is not accurate. The absence of specific knowledge about a particular conflict is not universally recognized as negating allegations of bias [*ICCA-QMUL Task Force Draft*, p.91]. There are no doubts that, in this particular case, Mr. Prasad should have taken all necessary steps to investigate any possible conflict of interests with the parties. However, he failed to do so and Mr. Fasttrack acted the same way.

**57.** In conclusion, all circumstances around the previous connections between Mr. Prasad and Findfunds LP subsidiaries give rise to justifiable doubts as to Mr. Prasad independence and impartiality.

**B. Mr. Prasad repeated nominations by Fasttrack & Partners give rise to doubts as to the arbitrator's impartiality or independence, according to IBA Guidelines Orange List**

**58.** On June 26 2017 Mr. Prasad disclosed that he has been appointed as an arbitrator by the law firm of Mr. Fasttrack twice over the past two years. The multiple appointments of an arbitrator are an objective indication of the view of the parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case [*OPIC Karimum v. Venezuela*].

**59.** Although the sheer number of multiple appointments alone might be sufficient to establish an evidentiary burden that there is a manifest lack of independence, other factors must invariably be part of that determination [*Newcombe*, p.3]. In this case, besides the high number of appointments in a short period of time, the combination of other factors around these previous appointments contribute to the presumption of justifiable doubts as to arbitrators independence and impartiality.

**60.** First, on 30 June 2017 Respondent retrieved from Claimant's *NofA* a Metadata that was attached to §14 in which Claimant nominated Mr. Prasad as its arbitrator. The Metadata revealed a comment from Mr. Fasttrack in which he asserts that he knows Mr. Prasad from two previous arbitrations and **he is the perfect arbitrator for the case** (emphasis added) [*NofC*, p.38 §3]. This comment enhances the over-confidence of Mr. Fasttrack in Mr. Prasad's work as an arbitrator in this case and his behaviour in trying to keep such fact not revealed, which clearly jeopardizes Mr. Prasad's independence and impartiality.

**61.** Second, in the two previous cases in which Mr. Prasad was appointed by Mr. Fasttrack's law firm, Mr. Fasttrack has given advice to the colleague running the case and had recommended Mr. Prasad as an arbitrator in the second arbitration [PO2, p.51 §9]. Hence, Mr. Fasttrack not only appoints Mr. Prasad in this arbitration, but also recommended him in a different case to a lawyer from the same law firm. Such behaviour indicates, once again, serious involvement of Mr. Fasttrack in Mr. Prasad's appointment, and where there is actual or apparent bias, there is also substantial injustice and there is no need for this to be additionally proved [*Cofely Limited v. Bingham*].

**62.** Finally, Mr. Prasad's decision-making history favours the interests of the appointing-party. The awards rendered in the previous cases in which Mr. Prasad acted as an arbitrator were all in favour of the parties which had appointed Mr. Prasad [PO2, p.51 §15]. Although Claimant attempts to deny, this circumstance - along with the other facts revealed - is sufficient to establish a connection between Mr. Prasad's vote and the interest of the appointing-party, which results in his manifest lack of independence. In this sense, it is important to point out that, where an arbitrator accepts repeated appointments from the same party, the opposing counsel or party may have concerns about the arbitrator's independence, fearing that his independence may be tainted by the wish to receive future appointments [*Obe*, p.86].

**63.** In accordance with the above mentioned and cumulatively with other circumstances of this challenge, Respondent indeed has concerns about Mr. Prasad's independence. Therefore, taking into account these suspicions and acting in good-faith, Respondent submitted Mr. Prasad's challenge in the earliest stage of this proceedings in order to expedite and settle this issue.

**64.** In conclusion, it is clear that Mr. Fasttrack's confidence and knowledge of Mr. Prasad's work would explain, to a considerable extent, the counsel's interest in reappointing him. Therefore, in accordance with Art.12 UNCITRAL Rules, all circumstances regarding the repeated appointments of Mr. Prasad by Mr. Fasttrack's law firm give rise to doubts as to arbitrator's independence and impartiality.

**C. Mr. Prasad's partner current case, which is funded by Findfunds LP subsidiary, constitutes grounds to Mr. Prasad's disqualification**

**65.** Accordingly to the IBA Guidelines on Conflict of Interests, the fact that Mr. Prasad's law firm has a significant commercial relationship with Findfunds LP, which is an affiliate of one of the parties, is a situation that disqualifies an arbitrator.

66. The case involving Findfunds LP is of commercial importance to the law firm since Slowfood has already charged USD 1.5 million on the case over the last two years, which accounts around 5% of the annual turn of Slowfood in each case of the last two years before the merger [PO2, p.50 §6]. These numbers can not be ignored, as they illustrate the financial importance of the case funded by Findfunds LP to Prasad & Slowfood. Therefore, it must be deemed that the interest and loyalty ties between the partners and employed lawyers of the law firm on the one hand, and the client on the other hand, is such a circumstance that undoubtedly shake the trust in the impartiality of an arbitrator employed by the law firm when the client is part of the arbitration proceeding [*Jilkén v. Ericsson*].

67. As so, the relevance of this commercial relationship between Prasad & Slowfood and Findfunds LP is clear in this case with the IBA Guidelines including this situation in the Waivable Red List, where are listed the serious situations in which an arbitrator should consider to recuse himself [*IBA Guidelines on Conflict of Interests*, p.17 §2].

68. An ongoing or potential client relation, or an adversarial relation between an arbitrator's law firm and a party or an affiliate, might be as if the arbitrator him- or herself had the same relation to the party. The rationale behind such an approach is that different attorneys in one law firm have access to information about each other's clients and cases, share their profits, use the same brand, develop a personal relation from having lunch and other informal gatherings together [*Tufte-Kristensen/Pihlblad*, p.594].

69. A relationship damaging to trust must be deemed to exist, even if the arbitrator has not himself had any direct client contact with the party [*Jilkén v. Ericsson*]. Hence, the fact that an equity partner of Mr. Prasad is representing a client who is funded by Findfunds LP subsidiary, combined with the significant commercial relationship that has been developed between Prasad & Slowfood and Findfunds LP, jeopardizes Mr. Prasad's independence and impartiality and leads to his disqualification.

**D. Mr. Prasad's position in the Vindobona Journal of International Commercial Arbitration and Sales Law article demonstrates his view on the merits of this arbitration, which constitutes doubts as to his independence and impartiality**

70. On 2016, Mr. Prasad published an article in the Vindobona Journal of International Commercial Arbitration and Sales Law concerning the merits of the case. In his article, Mr. Prasad positions himself very clearly against the modern trend in the understanding of the conformity concept in Art.35 CISG, which favours Claimant's position. Moreover, the

Metadata that Respondent retrieved from Claimant's *NofC*, contained a comment of Mr. Fasttrack in which he asserts that Mr. Prasad **is the perfect arbitrator for the case** (emphasis added) due to his view expressed in the Vindobona Journal of International Commercial Arbitration and Sales Law article [*NofC*, p. 38 §3]. Therefore, there is no doubt that this article is biased and was also crucial to Mr. Prasad's appointment by Claimant.

**71.** Respondent claims that the view expressed by Mr. Prasad in this article does not make him liable to a challenge. However, it is clear that there might be some inherent bias when an arbitrator has to decide an identical question of fact or law as arose before him in a previous matter [*Khambata*, p.631]. In such cases, there is a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view [*CC/DEVAS v. The Republic of India*].

**72.** Moreover, Art.3(2) of the IBA Rules of Ethics for International Arbitrators states that the fact that the arbitrator has already taken a position regarding the dispute might create an appearance of bias. Although Mr. Prasad's article in the Vindobona Journal does not specifically refer to this case, it is obvious that the article demonstrated that he had prejudged issues, likely to be relevant to the dispute, on which the parties have a reasonable expectation of an open mind. Hence, Mr. Prasad has already demonstrated his sympathy toward a legal issue in the dispute, which creates an appearance of bias according to the IBA Rules of Ethics.

**73.** In conclusion, the Arbitral Tribunal must assess Mr. Prasad's view in the article together with all other circumstances mentioned above regarding Mr. Prasad's connections with Claimant. The result of this assessment can only be one: the challenged arbitrator is biased. If Mr. Prasad is not removed from the Arbitral Tribunal, Respondent will be deprived to have its arguments heard and ruled upon by an arbitrator with an open mind.

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### CONCLUSION OF THE SECOND PART

**74.** The Arbitral Tribunal shall take into account the IBA Guidelines to decide Mr. Prasad's challenge. Moreover, the facts of this case indicate that Mr. Prasad's behaviour constitutes justifiable doubts to his independence and impartiality. The circumstances around the previous connections between Mr. Prasad and Findfunds LP, also Mr. Prasad's repeated appointments by Fasttrack & Partners and the current arbitration case in which Mr. Prasad's partner is participating are sufficient to justify this challenge. Finally, contrary to Claimant's submission, Mr. Prasad article demonstrates his view on the merits of this arbitration, which prevents Mr. Prasad to approach the issue in dispute impartially.

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**PART 3: RESPONDENT'S STANDARD CONDITIONS SHALL GOVERN THE CONTRACT**

**75.** Before addressing the merits of this case, clarifications need to be made regarding the legal grounds set forth by Claimant. Indeed, its Memorandum wrongly classifies Respondent's Tender Documents as an offer, when in fact these constituted an invitation to make an offer **(I)**.

**76.** By initiating the tender process, Respondent established the contractual framework that would govern a future contract **(II)**. A Letter of Acknowledgement was requested to those interested in contracting with Respondent in its conditions **(III)**. Although the offer later submitted by Claimant differed in some aspects from what was established by Respondent in its Tender Documents **(IV)**, Respondent decided to accept the changes given the importance attributed by it to the fact that both parties shared commitment to sustainable and ethical production **(V)**.

**I. The factual and legal qualification of the facts submitted in Claimant's Memorandum shall be clarified for this Arbitral Tribunal**

**77.** Claimant's reasoning expressed in its Memorandum contains some errors that need to be herein highlighted due to its importance for the present case.

**78.** It becomes evident that Claimant assumes two opposing positions regarding the negotiations between the parties that led to the formation of the supply contract. Claimant seems to misinterpret what is in truth a mere invitation to make an offer with an actual a binding offer established in Art.14 CISG.

**79.** Art.14(1) CISG requires that, in order for a proposal to be considered a binding offer, it has to be sufficiently definite and the offeror has to have an intention to be bound in case of acceptance [*OLG Frankfurt am Main; Eörsi; Lookofsky; Honnold*].

**80.** When Respondent published and sent the Tender Documents to a few business parties, Claimant included [*Cl. Exb. C11, p.25 §7*], informing them about the ongoing process, it invited them to make offers, as can be clearly reached by the expressions it used [*"We would therefore be delighted if you participated in our tender process"* and *"I look forward to the submission of your offer and remain"* in the email sent to Claimant, on 10 March 2014; *Cl. Exb. C1, p.8 §4*]. Also, in the Tender Documents, Respondent states that *"(...) the contract for this work will be awarded (...)"* [*Cl. Exb. C2, p.10 §3*] by which it meant that it expected to receive more than one offer and therefore would have to award the contract to one of the offerors.

**81.** Taking into consideration all expressions stated above, one can conclude that the intention to be bound is clearly missing, since Respondent did not logically wish to be bound to every person who would reply to its publication.

**82.** That there was an invitation by Respondent is precisely the reasoning followed, in a first moment, by Claimant in the beginning of its Memorandum [*MfC*, p.45 §75]. However, in a second moment, Claimant changes its understanding by alleging that it is plausible to qualify the Tender Documents as a binding offer [*MfC*, p.47 §82], merely to later apply Art.19 CISG in its favour (A), even though there are no factual grounds to sustain this argument. The Arbitral Tribunal must, therefore, disregard such line of argument due to its incoherency.

**A. Even if this Arbitral Tribunal decides that Art.19 CISG is applicable to the present case, Claimant's application of this article is still incorrect**

**83.** Art.19(1) CISG contains what is usually referred to as the “*mirror-image rule*” providing that, in order for a contract to be considered formalized, the acceptance must be the exact reflection of the offer, otherwise it is considered a counter-offer. [*Fejős; Viscasillas; DiMatteo; Lookofsky; Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*]. This demand is softened by Art.19(2) CISG which determines that a reply will solely be considered an acceptance if immaterial alterations are proposed [*Fejős; Wildner*]. In order to assess if an alteration is material one must take into consideration the situations provided in Art.19(3) CISG.

**84.** Claimant's reply, on 27 March 2014 [*Cl. Exb. C3*, p.15], constituted the first binding offer, in which it introduced three alterations to the Tender Documents, two of which were material (the form of the cake and the payment conditions) and one of which was allegedly immaterial (the incorporations of its standard terms).

**85.** However, taking into account Claimant's second understanding (referred above), since material alterations pursuant to Art.19(1) CISG were introduced, and if Respondent's Tender Documents were to be classified as an offer, then Claimant's reply [*Cl. Exb. C4*, p.16] would constitute a counter-offer.

**86.** Claimant applies incorrectly Art.19 CISG in order to benefit from two conclusions, which were themselves incorrect: that the parties have entered into a battle of forms (1) and that Respondent had a duty to object to the standard terms (2).

**1. If the parties had entered into a “battle of forms”, Respondent’s GCC and CC would be applicable**

**87.** In the first part of its Memorandum, while sustaining that the Tender Documents were part of an invitation to tender, Claimant invokes to be before a “battle of forms”. However, a true “battle of forms” emerges from the application of Art.19 CISG, through both parties’ attempts to subject a contract to their own dissenting standard terms [Huber/Mullis] and by submitting offers and counter-offers [Sukurs; Piltz]. Such “battle of forms” did not occur in the present case, considering that, as stated, only an invitation to make an offer and an offer existed. In addition, Claimant’s alleged incorporation of its terms was clearly invalid (the terms were not attached to the offer).

**88.** Therefore, these two clarifications lead to the inevitable conclusion that the “battle of forms” [MfC, p.45 §76] has no application in the present case.

**89.** The “battle of forms” issue can be resolved through the application of different theories. The “first shot doctrine”, which determines that the applicable terms are those presented firstly [Sukurs], is used by Claimant in its Memorandum to reach the conclusion that Claimant’s terms prevail, as it supposedly fired the first shot by submitting the first binding offer.

**90.** However, this doctrine would actually lead to the application of Respondent’s standard terms. Given the specific context of these negotiations, the “first shot fired” can only be Respondent’s, since it was the first to present the terms that would govern the contract. Subsequently, Claimant also presented its terms in its offer. Therefore, the doctrine of the “first shot rule”, which, by Claimant’s firm conviction, should rule this battle, settles the dispute in favour of the application of Respondent’s GCC and CC.

**2. The incorporation of standard terms constitutes a material alteration pursuant to Art.19(3) CISG**

**91.** In a second moment, when Claimant alters its understanding [MfC, p.46-47] and states that the Tender Documents were sent as an offer from Respondent, it considers that its reply constituted an acceptance.

**92.** By means of its unreasonable reasoning (unreasonable, considering that facts lead to an invitation to make an offer), Claimant manages to fall within the scope of Art.19 CISG, and concludes that the standard terms included in its counter-offer [Art.19(1) CISG], which

allegedly constitute an immaterial alteration, needed to be objected to by Respondent in order to avoid their incorporation into the contract [Art.19(2) CISG].

**93.** Even though Respondent is strongly convinced that the incorporation was invalid (as it will be explained further ahead in this Memorandum), if the Arbitral Tribunal hypothetically considers that it was valid, Claimant's qualification of its standard terms as an immaterial alteration is nevertheless incorrect [Piltz]. Such incorporation of the standard terms regards the "*extent of one party's liability to the other*", qualified in Art.19(3) CISG as a material alteration, since Claimant actually bases its claim on the application of its own Code, by stating that its CC establishes a means obligation, whereas Respondent's CC contains a duty to achieve a specific result.

**94.** However, even if the Arbitral Tribunal were to consider that the change was immaterial, in any case Art.19(1) and (2) CISG still could not be applied simultaneously [MfC, p.46, Section C], since both paragraphs are based upon opposing premises [Uncitral Digest Art.19]. Through the reading of Art.19(1) and (2) CISG one can conclude that these are actually alternatives since a reply cannot be simultaneously qualified as a counter-offer and an acceptance.

## **II. Respondent put out a tender in which it established the contractual framework**

**95.** Contrarily to Claimant's allegation [MfC, p.44§ 70], the Tender Documents presented by Respondent evidently established the parameters within which the contract would be entered [*"The invitation to Tender consists of the following documents (...)" Cl. Exb. C2, p.9*]. These parameters were essentially Respondent's GCC, in which it established its zero tolerance policy towards unethical business behaviour, such as bribery and corruption; its CC, since it strongly valued the principles of fair labour, sustainability and anti-corruption and wanted its suppliers to guarantee compliance to such principles [Respondent CC, Section E, p.14]; and its General Business Philosophy, where Respondent commits itself as a business entity to the Sustainable Development Goal promulgated by the UN [PO2, p.53 §31].

**96.** With the contractual framework clearly established, Respondent would only accept offers that complied and respected its requisites.

## **III. In the Letter of Acknowledgement, Claimant accepted to tender in accordance and in respect of the framework established by Respondent**

**97.** Respondent requested all potential partners, interested in submitting an offer in accordance with the documents sent, to submit a LofA in order to "*guarantee that the contract*

would be governed by RESPONDENT's General Conditions of Contract and its Code of Conduct for Suppliers" [Response to NofA p.25 §8].

**98.** On 17 March 2014, Claimant returned the *LofA* to Respondent [Resp. Exb. R1, p.28], manifesting its commitment to submit an offer in respect of the latter's requirements.

**99.** However, Claimant, on 27 March 2014, made an offer which differed partially from the tender, since it contained two modifications. Respondent nevertheless informed Claimant that the offer had been successful, given that the parties' shared commitment to sustainable production overcame the downside of accepting the alterations [Cl. Exb. C5, p.17].

**100.** Claimant now alleges that another change was pursued: the inclusion of its GCS and CC. However, in order for this to be sustained, Claimant would have to expressly inform Respondent of its intention, since it clearly contradicts the *LofA*. The letter created a legitimate expectation that the offers received would follow the requisites of the tender, since the proposal would be "*in accordance to the specified requirements*" [Resp. Exb. R1, p.28].

**101.** Because Respondent had this expectation, and Claimant inserted this modification in a footnote and not in the terms of the contract [Cl. Exb. C4, p.16], Claimant did not clearly manifest its intent of incorporating its terms. Therefore the contract must be considered subject to Respondent's terms and Code.

#### **IV. Claimant's offer, on 27 March 2014, was valid pursuant to Art.14(1) CISG**

**102.** Claimant, on 27 March 2014, submitted a valid proposal [Cl. Exb. C4, p.16], since it was sufficiently definite (the "*essentialia negotii*" being the price, the quality and the quantity, all set forth in the Sales Offer) [Cl. Ex. C4, p.16] and manifested the offeror's intention to be bound in case of acceptance. These are the two requisites set out by Art.14(1) CISG [Secretariat Commentary Art.14; Vural; Schlechtriem; Valioti].

**103.** Regarding the proposal's definitiveness, the minimum content, [Honnold; Enderlein/Maskow] which includes the description of the goods "*Chocolate Cake - Queens' Delight*" as well as the quantity "*20,000 per day*" and the price "*USD 2*" [Cl. Exb. C4, p.16], was fulfilled. As to Claimant's intention to be bound, it became clear in the email sent by Mr. Tsai, Claimant's Head of Production, when it stated that it hoped that Respondent would find "*the offer attractive*" [Cl. Exb. C3, p.15 §5]. Claimant manifested its "*animus contrahendi*" [Cvetkovik] by presenting its offer during Respondent's tender process.

**104.** Claimant's offer was characterized by the presence of two important modifications, namely, the different shape of the cake and the different payment conditions. These were the

only modifications to Respondent's Tender Documents validly presented, by reference in the e-mail, and further expressly accepted.

**105.** Claimant alleges that its subtle reference to its GCS in its Sales Offer constitutes an incorporation of such terms into the proposal. However, this incorporation was clearly invalid **(A)** since these were not directly sent to Respondent nor was Claimant's made intention clear.

**106.** Through the course of negotiations, any reasonable person in Respondent's position would conclude that the contract between the parties would be governed by the parameters established by Respondent in its Tender Documents, with the two modifications suggested by Claimant **(B)**.

**107.** This is easily perceptible by the fact that Claimant itself linked its offer to the tender documents when it used the expression "*as per Tender Documents*" [Cl. Exb. C4, p.16] and given the fact that it attached to the offer a "*full set of the Tender Documents*" [PO2, p.52 §27].

**A. Nevertheless, Claimant's attempt to incorporate its own standard terms in its offer did not fulfill the requirements**

**108.** Although Claimant expressed its commitment in the *LofA* [Resp. Exb. R1, p.28] to present a proposal in accordance with the specified requirements (meaning, the Tender Documents), Claimant's offer differed from the original Tender Documents sent by Respondent.

**109.** The email in which the modifications were referred did not mention the inclusion of Claimant's GCS and CC which is, at the very least, extremely surprising, given that Claimant now alleges that this inclusion was of the utmost importance. In fact, Claimant's GCS and CC were only mentioned in a subtle footnote in the Sales Offer which redirected the reader to Claimant's website.

**110.** Regarding the incorporation of standard terms [*Claimant's GCS and CC*], the majority of scholars sustain that the standard terms need to be made available to the other party in order for a valid incorporation of standard terms to occur [*Magnus; Ferrari in Kroll/Mistelis/Perales Viscasillas*]. Such availableness can only be accomplished by attaching the terms to the proposal or simply handing them over personally. As stated by the District Court Neubrandenburg, "(...) it would contradict the principle of good faith in international trade (Art.7(1) CISG), as well as the general obligation on the parties to cooperate and

*provide information (...), to burden the contractual partner with a duty to familiarize itself with clauses which were not even sent to it” [Pitted Sour Cherries case].*

**111.** Further, many courts have held this approach, [*Machinery case*; *Fresh-Life v. Cobana*; *Netherlands Arbitration Institute, Interim Award of 10 February 2005*; *Sesame Seeds case*] known for being the one that more sternly respects the principles underlying the CISG [*Advisory Council Opinion No.13*].

**112.** In the leading *Machinery* case the court sustained that good faith efforts to communicate the terms to the other party must be pursued, and “*failure to provide the text of standard terms have lead courts to exclude such terms from the contract*”. For this the court, the burden to provide the terms was on the party wishing to insert such clauses.

**113.** In conclusion, no standard terms were validly incorporated in Claimant’s offer.

**B. A reasonable person in Respondent’s position would have disregarded the discrete footnote**

**114.** Art.8 CISG determines that the conduct of a party shall be interpreted according to its intent, as long as the other party knew or ought to know what that intention was. Both parties agree on the lack of common understanding about the insertion of their respective standard terms, for which Art.8(1) CISG cannot be applied. Thus, one must resort to the general principle of the understanding of a “*reasonable person*” [Art.8(2) CISG] in order to determine the way in which both parties’ declarations regarding such matter should be interpreted [*Uncitral Digest Art.8*; *Building Materials case*].

**115.** Both Respondent and Claimant are sophisticated parties, relevant in the international market, and therefore are expected to have added expertise and act in good faith when in comes to the negotiation of a contract. Given that Respondent had already set out the parameters of the contract, and that Claimant communicated that it would pursue to some “*minor amendments*” [*Cl. Exb. C3, p.15 §3*], any other person in Respondent’s position would not have considered Claimant to have subject its offer to its GCS and CC. This would not be a minor but a major amendment, as acknowledged by Claimant by advocating that the application of its Codes leads to a different result (means obligation) when compared to the application of Respondent’s Code (result obligation).

**116.** Furthermore, the way in which Claimant’s GCS are addressed is contained in a standard form clearly used in all offers sent by Claimant [*PO2, p.53 §28*] because of its general writing - for instance, this is obvious if one notes the expression “*not applicable*” after the “*Specific*

*Terms and Conditions*” [Cl. Exb. C4, p.16] which will certainly exist in other contracts but not to this one. For this reason, the footnote was disregarded given that it would simply not be applicable to the present case, where the applicable set of rules had already been established by the initiator of the negotiating process - Respondent.

#### **V. Respondent decided to accept, on 7 April 2014, Claimant’s modifications to the Tender Documents**

**117.** Although Claimant’s offer differed from the specified requirements that Respondent had set out, the modifications proposed, related to the payment and the form of the cakes, were overall acceptable. Indeed, Claimant’s GC membership and supposed firm commitment to its values surpassed the downside of a shorter payment period and a different shaped cake (**A**).

**118.** In addition, Respondent valued Claimant’s CC which revealed the same concerns and commitments as Respondent’s. However, the fact that Respondent commended Claimant for such high resemble in the setting of its behaviour was simply a cordial statement towards its new business partner and at any time meant that Respondent would agree that the principles therein contained did not have to be firmly uphold (**B**).

#### **A. Respondent's acceptance only mentions the modifications to the payment and the form of the cake**

**119.** Respondent accepted Claimant’s offer, pursuant to Art.18 CISG, and thus the contract was formed in that moment. An analysis of Respondent’s acceptance clearly indicates that only the modifications regarding the form of the cake and the payment were accepted by Respondent: “(...) *your tender was successful notwithstanding the changes suggested by you. The different payment terms and form of the cake are acceptable to us (...)*” [Cl. Exb. C5, p.17 §2]. At any moment did Respondent express its intention to adhere to Claimant’s CC.

**120.** The reason why Respondent accepted the offer submitted by Claimant, notwithstanding the modifications proposed, was that Claimant was a company which allegedly pursued the same values of fair labour, sustainability and business ethics through the production process [Cl. Exb. C1, p.8 §3; PO2, p.52 §23]. In addition, Respondent valued Claimant’s GC membership since it had the purpose of becoming a Global Compact LEAD company by 2018 [Cl. Exb. C1, p.8 §4]. In order to reach this position, a company has to obey to high standards regarding the management of its supply chain; thus, given Claimant’s good reputation Respondent unfortunately trusted its expertise.



**B. Respondent did not give its consent to the incorporation of Claimant's standard terms when it complimented Claimant's Code of Conduct**

**121.** Claimant alleges that, when Respondent complimented Claimant's CC it accepted to adhere to such Code [*MfC*, p.48 §86]. However, such conclusion cannot be ascertained by Respondent's response. Respondent only complimented Claimant's CC in order to express that the values pursued in its Code were essential in Respondent's decision to contract with Claimant. This is clearly perceptible when Respondent stated that *"A decisive element for Comestibles Finos' decision was your convincing commitment to sustainable production. Such commitment is well evidenced in your impressive Codes of Conduct"* [*Cl. Exb. C5*, p.17 §3].

**122.** Respondent stated that it had read Claimant's CC *"out of curiosity"* [*Cl. Exb. C5*, p.17 §3] and that's because on one hand, the incorporation of Claimant's standard terms was not in question, since it wasn't properly invoked, and on the other hand, Respondent did not manifest any intention to adhere to Claimant's CC when it merely complimented the values pursued in such Code. The same conclusion would be achieved by a reasonable person [*Art.8(2) CISG*] in Respondent's position.

**123.** Therefore, Claimant's allegation in this matter has no grounds since the incorporation of Claimant's CC is not in debate in the first place.

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**CONCLUSION OF THE THIRD PART**

**124.** Taking into consideration all the facts and arguments presented above, the Arbitral Tribunal should conclude that Respondent's GCC and CC shall govern the contract celebrated between the parties, since these were the only standard terms validly incorporated.

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**PART 4: BY DELIVERING NON-CONFORMING GOODS, CLAIMANT FAILED TO COMPLY WITH ITS OBLIGATION TOWARDS THE CONTRACT THAT REQUIRED A DUTY OF RESULT**

**125.** Although the parties entered into a contract for the supply of sustainably produced chocolate cakes, Claimant failed to comply with its duty, by using cocoa suppliers involved in a corruption scheme and causing deforestation. Because the production process is part of the quality concept under Art.35(1) CISG, Claimant delivered non-conforming goods **(I)** which amounts to a fundamental breach of the contract, giving Respondent the right to avoid the contract immediately **(II)**.

**I. According to Art.35(1) CISG the cakes delivered are non-conforming to the contract**

**126.** Pursuant to Art.35(1) CISG, the conformity of the goods shall be determined by the specific quantity, quality and description agreed upon by the parties **(A)**. As to the quality, the parties agreed that the cakes would be produced in a specific manufacturing manner - produced in a sustainable and ethical way **(B)**.

**127.** Unfortunately, Claimant was not able to comply with the last essential requirement, delivering non-conforming goods that were the product of corruption, and environmental damage, tarnish the image and reputation of Respondent's company.

**128.** The nature of the infringed obligation imposed by the contract was one of achieving a specific result **(C)**, but even if the Arbitral Tribunal reaches the conclusion that it was one of best efforts, in either way, Claimant did not fulfill this obligation **(D)**.

**A. Under Art.35(1) CISG the assessment of conformity has to be done in accordance with the contract**

**129.** It is pacific among legal scholars that the specific requirement of conformity under Art.35(1) CISG should be deduced from the purpose and circumstances of the contract. [Enderlein/ Maskow; Secretariat Commentary Art.35; Poikela; Henschel; Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld]. It is also important to clarify that the primary consideration for the assessment of conformity is Art.35(1) CISG, since Art.35(2) CISG "*is a subsidiary definition which only applies to the extent that the contract does not contain any details of the requirements to be satisfied under Art.35(1)*" [Wilson]. Thus, first and foremost, one has to consider whether the contract required the goods to be produced in a sustainable way.

**130.** In the present case, it is indisputable the importance that both parties gave to the fact that the chocolate cakes would not only have to be fit for the purpose of eating but would also be produced in a sustainable way. According to the intention of the parties [Cl. Exb. C1, p.8; Cl. Exb. C5, p.17] and to the contract both signed, which included a CC obliging Claimant to deliver goods that would respect the high standards of sustainability agreed upon [Cl. Exb. C2, p.9], there is no doubt that the way in which the cakes should have been produced was fundamental.

**131.** Doctrine has considered that the parties have complete autonomy as to whether and which ethical standards should be considered part of a contract [Schwenzer]. When the parties agree to such terms, they define the quality of the goods in the sense of Art.35(1) CISG.

Consequently, if the goods do not live up to these specifications, they are non-conforming to the contract [Schwenzer].

**B. Claimant's failure to comply with the contract resulted in the cocoa beans' lack of quality**

**132.** The “*nucleus of an international sale*” is the defined physical characteristic of the good [Maley]. Adjacent to this nucleus, the parties may contract terms that do not only specifically concern a physical aspect but also a non-physical characteristic of the good [Ferrari; Maley, *Organic Barley case*; *Souvenir Coins case*; *Soy Protein Products case*].

**133.** “*Since there are no limits to the contractual requirements that the parties may agree with respect to the goods*” [Maley], any stipulation agreed by them related to fundamental ethical principles, such as production of the goods in a certain way, is part of the quality characteristics of the contract and it is enforceable [Schwenzer].

**134.** As it can be read on the Tender Documents, Claimant “*must*” deliver goods that respect Respondent’s Business Philosophy and CC for suppliers, assuring the same behaviour from its suppliers [Cl. Exb. C2, p.9]. This includes conducting its business in accordance with the ten GC Principles and all the other complementing environmental and ethics values established in those documents, making sure its suppliers do the same.

**135.** However, what did happen was that Claimant’s supplier for the cocoa beans, the raw material used to produce the chocolate cakes, was involved in a sustainability certificate scheme. It helped to burn large parts of rainforest, causing 100,300 premature deaths in Ruritania, while bribing members of the government to issue permits within those nature reserves. Evidence shows that just the recent fires burnt more than two million hectares and affected 44 million people [Cl. Exb. C7, p.19].

**136.** The facts show conclusively that the cakes delivered did not respect the sustainability standards set forth in the contract since they violated principles seven, eight, nine and ten of the GC Principles and Respondent’s Business Philosophy. Thus, the cakes are non-conforming to the contract.

**137.** In the same line of reasoning and providing the solution for the case in hands, Ingeborg Schwenzer and Benjamin Leisinger state that “*goods processed under conditions violating the contractually fixed ethical standards are not of the quality asked for by the contract*”.

**C. The obligation imposed by the contract was an obligation of results**

**138.** After addressing Claimant's violation of the contractual terms and unfulfilled obligation, focus should be given to the nature of the obligation in question, that is an obligation of achieving a specific result. Failure to achieve the specific promised result is equivalent to non-performance according to Art.5.1.4 UNIDROIT, which is applicable as chosen law [Clause 19, Cl. Exb. C2, p.12; *Unidroit Official Commentary Art.5.1.4*].

**139.** Art.5.1.5 UNIDROIT establishes criteria in order to determine the extent of the duty involved in a certain obligation. The way in which an obligation is expressed in the contract and its contractual price demonstrate why the duty at issue is one of achieving a specific result [Art.5.1.5 (a), (b) UNIDROIT].

**140.** According to the Tender Documents, the ingredients of the chocolate cakes "*have to be sourced in accordance with the stipulation under section VI*", and this is in respect to the "*high standards of integrity and sustainability*" [Cl. Exb. C2, p.11].

**141.** Those evidences are joined by others such as: "*shall conduct your business in an environmental sustainable way*", "*in particular you will*" [Section C, Cl. Exb. C2, p.13], "*you shall conduct your business in a ethical manner*" [Section C, Cl. Exb. C2, p.13], "*you must under all circumstances procure goods and services in a responsible manner*" [Section D, Cl. Exb. C2, p.14].

**142.** Concerning the contractual price criteria, Respondent, expecting a product with guaranteed special and stricter characteristics, was even paying the price of a premium product when, in the end, surprisingly, the cakes delivered did not comply with the imposed standards of sustainability [PO2, p.54 §40]. Respondent would have never paid for an attempt to deliver goods in conformity with the contract, Respondent paid because he had in fact a sincere expectation that Claimant would fulfill the demands of the contract.

**143.** Moreover, opposite to what Claimant alleged [MfC, p.54 §125], Section E of Respondent's CC that provides Claimant with the option to choose a comparable CC for its own suppliers, does not discharge Claimant of assuring that its own suppliers are not in breach of all the principles that Respondent's business stands for [Section D, Cl. Exb. C2, p.13].

**144.** In conclusion, the above mentioned should be considered as indisputable proof that the obligation underlying the contract is an obligation of result and that Claimant failed to comply with it.

**D. Even if the Arbitral Tribunal considers that it is before an obligation of best efforts, Claimant still did not comply**

**145.** Claimant asserts that the obligation implied in the contract is merely an obligation of best efforts. Although Respondent completely objects to Claimant's attempt to avoid due diligence, if the Arbitral Tribunal would hypothetically consider it, Claimant still failed to comply with its obligation.

**146.** According to Art.5.1.4 UNIDROIT, although the duty of best efforts does not comply the party to achieve the specific result, it does oblige the party to exert the efforts that a reasonable person of the same kind would do in the same circumstances.

**147.** Claimant, being an experienced company in the supervision of supply chains [PO2, p.54 §34], failed to control its supplier activities in Ruritania, either because the provided audit was not helpful, or because Claimant's concern in which regards its suppliers was neglected.

**148.** Claimant supports its case based on the monitoring performed by Claimant itself and a hired company to audit Ruritania Peoples Cocoa. However, that monitoring was self-evidently not adequate. On one hand, Egimus, the expert hired to verify Ruritania Peoples Cocoa compliance with the GC Principles, did not have in its scope the assessment of the suitability of the State Certificate System which had been chosen by Claimant [PO2, p.53 §33]. On the other hand, Claimant, being a sophisticated party, did not ensure the proper diligence just by requesting those certificates.

**149.** Claimant was, indeed, obliged to ensure that the object contained in those documents was valid and authentic because "*where certification requirements form a part of the contractual description, the seller's obligation is not merely to provide such certificates*". Claimant had an "*implied duty of making sure the goods were consistent with the descriptions and certificates*" [Maley; Souvenir Coins case]. Thus, the audit provided by Claimant was deficient.

**150.** Over and above, it is evident that Claimant was careless in what concerns its supplier's activity. One good example is the fact that, on 27 January, Respondent was the one that warned Claimant about the scandal involving its own supplier [Cl. Exb. C6, p.18]. The article with the same concern was published on 23 January on the biggest newspaper based in the Claimant's country [Cl. Exb. C7, p.19; Cl. Exb. C11, p.26 §15], and it followed a released report dated 6 January warning about crimes involving Ruritania.

**151.** After these clarifying facts, it would be at the very least naive to say that, after all this public information, by the time Claimant received the email on 27 January, it was surprised

about the information delivered from Respondent and confident that there was no problem with the cocoa beans delivered [*Cl. Exb. C8, p.20*].

**152.** To summarize, Claimant did not take all the possible and necessary steps that a reasonable person of the same kind would do in the same circumstances, to guarantee compliance by its supplier.

**II. Respondent has the right to avoid the contract since Claimant's failure to comply with its obligation of delivering conforming goods amounts to a fundamental breach of the contract**

**153.** Because the non-conformity of the cakes delivered constitutes a fundamental breach according to the Tender Documents agreed by both parties (**A**), Respondent legitimately exercised its right of terminating the contract with Claimant (**B**).

**A. As it can be read on Respondent's General Conditions of Contract, any relevant breach of Respondent's Code of Conduct for suppliers constitutes a fundamental breach of the contract**

**154.** Clause 4 of Respondent's GCC states that any "*breach of some relevance*" related to Respondent's Business Philosophy or its CC for suppliers has to be considered a fundamental breach of the contract [*Cl. Exb. C2, p.12*].

**155.** By reading Section III of the Tender Documents, related to the specifications of the goods [*Cl. Exb. C2, p.10*], one can materialise the concept of "*breach of some relevance*" stating the essentiality of the sourcing of the cakes (**1**). After Respondent's email expressing concerns about Claimant's suppliers [*Cl. Exb. C9, p.21*], Claimant confirmed that Ruritania Peoples Cocoa violated the principles contracted by both parties, assuming then the lack of conformity of the chocolate cakes (**2**).

**1. Clause 1 of Respondent's Specification of goods confirms that the sustainability standards were "*paramount*" to the conformity of the cakes**

**156.** The definition of fundamental breach has been discussed between scholars and the conclusive point is that the concept depends on the circumstances of each case and specifically when the breach depreciate the aggrieved parties justified contract expectations, even though there are some criteria that give guidelines to support a conclusion [*Graffi; Uncitral Digest Art.25*].

**157.** According to the circumstances of the case, the breach was fundamental since Claimant violated an essential contractual term. This is easily perceivable by Section III of the Tender Documents, entitled “*Specification of the Goods and Delivery Terms*” which declares the “*paramount*” importance of the fact that the chocolate cakes’ raw materials “*have to be sourced according to the principles established in Section IV*” [Cl. Exb. C2, p.10].

**158.** This last cited document highlights that Respondent is “*committed to high standards of integrity and sustainability*“, that it “*has a ‘zero tolerance’ policy when it comes to unethical business behaviour, such as bribery and corruption*” and that it “*expects all of its suppliers to adhere to similar standards and to conduct their business ethically*”. And hence, for the chocolate cakes to be considered conforming to the contract, the cocoa beans also have to be produced in a sustainable manner. Because that requisite was not fulfilled, Claimant incurred in a fundamental breach of the contract, consequence predicted in Respondent’s GCC [Cl. Exb. C2, p.12]. This conclusion is obvious in the eyes of Katerina Peterkova Mitkidis affirming that it is easy to establish whether the breach amounts to a fundamental one when it is governed by the contract.

**159.** Benjamin K. Leisinger confirms this line of reasoning stating that there is a fundamental breach when the buyer purchases the goods for a particular purpose expressed in the contract. The decisive point about this view is whether the goods can still be used for that particular purpose. In Respondent’s case the answer is negative since the cakes’ lack of conformity precluded Respondent to sell them as fair trade products which was its objective.

**160.** Additionally, taking into consideration the merchantability criteria of the goods [Graffi], which defines a fundamental breach when the lack of conformity undermine the commodities commercialization, the chocolate cakes are still defective. Because the production process affected the quality of the cakes, the sale of the goods was excluded from Respondent’s options. Thus, based on the economic loss, Respondent was in face of a fundamental breach of the contract.

## **2. Claimant itself confirmed the cakes’ lack of conformity**

**161.** Contrarily to what Claimant alleged, Respondent did not fail to prove the non-conformity of the cakes since Claimant itself has fulfilled that requirement by confirming the lack of conformity by its suppliers on an email sent on 27 January. In Claimant’s words, the “*chocolate cake have not been produced in accordance with the contractually required principles*” [Cl. Exb. C9, p.21].

**B. Respondent legitimately terminated the contract**

**162.** Accordingly to “*pacta sunt servanda*”, a basic principle of contract law, an agreement that has been concluded by the parties and is not affected by any grounds of invalidity is binding [Art.1.3 UNIDROIT]. If one fails to comply with those terms, it has to bear the remedies enshrined in the contract.

**163.** Since Claimant delivered goods that were non-conforming to the contract, and taking into consideration that this lack of conformity embodies a fundamental breach, Respondent legitimately avoided the contract. By doing so, Respondent honoured the contract and the chosen law, in particular Art.49 CISG, both agreed by the parties.

**164.** Claimant objects to this interpretation claiming its right to cure the contract [Art.48 CISG] based on Principle F entitled Inspections and Corrective Actions [Cl. Exb. C2, p.14], and stating that Respondent could not have terminated the contract without giving “*specific directions as to the corrective actions that were required to be taken by the Claimant*” [MfC p.57 §144].

**165.** However, “*the seller’s right to cure cannot prevent the buyer from declaring the contract avoided*” [Graffi]. As pointed out by this author, if the breach is fundamental, Respondent should have the right to avoid the contract regardless of “*whether the seller has made an offer to cure*”. The right to cure should be considered then as an alternative given to the buyer, who will be given the right to decide which option is more convenient, to accept the cure or to avoid the contract [Enderlein/Maskow].

**166.** In the same line of reasoning there is the ICC arbitral award that recognizes the principle that the buyer should have the last word on the avoidance of contract [ICC case 7531/1994].

**167.** In conclusion, given all the factual and legal grounds of the case, Respondent had the right to immediately avoid the contract in face of Claimant’s fundamental breach, which it did.

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**CONCLUSION OF THE FOURTH PART**

**168.** By delivering chocolate cakes produced in violation of the sustainable standards agreed upon in the contract, Claimant failed to comply with the heart of the seller's contract obligation which was to deliver the right goods. That failure embodies a lack of conformity concerning the quality of the goods by Claimant which constitutes a fundamental breach of the contract, since quality is a paramount specification of the contract.



**169.** The culminate of all of those facts justified Respondent legitimate avoidance of the contract.

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### **REQUEST FOR RELIEF**

For the reasons stated in this Memorandum, Counsel respectfully requests this Arbitral Tribunal to declare that:

- 1.** Mr. Prasad's challenge must be decided by the remaining two members of the Arbitral Tribunal or, subsidiarily, by the full Arbitral Tribunal with the exclusion of challenged arbitrator's vote on the decision of challenge;
- 2.** Mr. Prasad shall be removed from the Arbitral Tribunal;
- 3.** Respondent's General Conditions of Contract shall be deemed as applicable to the contract;
- 4.** Claimant delivered non-conforming goods pursuant to Art.35 CISG and the contract entered into by the parties. The claims for payment raised by Claimant shall be therefore rejected;
- 5.** Claimant shall bear all the costs of this arbitration;

Respondent reserves the right to amend its request for relief as may be required.

## CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Lisbon, 18 January 2018,

Bruna Corby

Bruna Corby Nunes

Jamilly Gomes

Jamilly Gomes C. Novaes

Jenny Medina

Jenny Spencer Medina

Madalena Palha

Madalena Palha

Sara Margarida Freitas

Sara Margarida Freitas